UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

Plaintiff,

v. 12 CV 1422 (JSR)

BANK OF AMERICA CORPORATION, *successor to Countrywide Financial Corporation, Countrywide Home Loans, Inc., and Full Spectrum Lending*, et al.,

Defendants.

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New York, N.Y.
October 21, 2013
10:30 a.m.

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

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(Jury not present)

THE COURT: All right. With respect to the proposed jury instructions one through seven, are there any objections edits, or additions from the government?

MR. ARMAND: With regard to one through seven, I don't believe so. I think the only thing we noted on instruction number seven was that it listed some witnesses, experts from the defense who didn't testify.

THE COURT: That's true, right.

MR. ARMAND: Arnold Barnett and Charles Rice are listed there.

THE WITNESS: Right, just Robert Broeksmit.

THE COURT: All right. Anything from bank counsel?

MR. SINGER: Few things, your Honor. With regard to -- these are all, I think, in the nature of proposed additions as opposed to objections to the language that's there.

In instruction number one, I wonder if it would make sense to remind the jurors that the preliminary instruction that they received the first week is -- they should essentially disregard that.

THE COURT: I saw that in your proposal. Actually, I don't see anything in my current instructions that is any way, shape, or form inconsistent with the preliminary instructions, so I see no need for that. If I had changed something that

would have been different, but preliminary instructions, of course, say on their face they are no substitute for the final instructions. But I think to say anything further at this point would wrongly convey to the jurors that there was some change from the preliminary instructions where there is not.

MR. SINGER: This is one that I don't feel particularly strongly. The instinct I has was only to remind them because of the brevity of the preliminary instructions that they're obviously incomplete as opposed to these instructions.

THE COURT: Yes, although -- well, all right. Let me see. How about this, in the first paragraph on page 1, after the second sentence, which the second sentence reads: Before you retire to deliberate, it is my duty to instruct you as to the law that will govern your deliberations. Then insert following sentence: These are the final and binding instructions and entirely replace the preliminary instructions I gave you earlier.

MR. SINGER: That would be fine, thank you.

THE COURT: OK.

MR. MUKASEY: Before Mr. Singer goes on, I want to note that defendant Mairone will join in the exceptions taken by the bank and the suggestions offered by the bank, and then we'll have some specific requests of her own.

THE COURT: OK.

MR. SINGER: And instruction number two, a few suggestions. We had requested an instruction that the jurors should use their common sense in weighing the evidence. The term "common sense" is one that appeals to us as a matter of jury argument and seems to be a correct instruction, so we request that.

THE COURT: Where are you referring to?

MR. SINGER: Our instruction request number two. The language was: You should use your common sense in weighing the evidence, consider the evidence in light of your everyday experience with people and events, and give it whatever weight you believe it deserves.

THE COURT: Well, you're free to say that on summation. I actually don't know a single case that actually says that. Do you have a citation?

MR. SINGER: I think we got it from the O'Malley pattern instructions.

THE COURT: Yes, I saw you were reduced to O'Malley as opposed to Sand, et al. for that purpose. I don't believe it is an instruction that should be given.

MR. SINGER: Also in instruction number two there's a reference to -- the second page, might be the first page, there's a reference to the paragraph beginning: Testimony consists of the answers that were given by the witnesses. And there's a reference to depositions that were read into

evidence. I think given the way that things have progressed it should say something like deposition videos.

THE COURT: Thank you. Or in the depositions that were presented. OK.

MR. SINGER: Then we also ask an instruction of the jury should not speculate about matters not in evidence. And for this one, this is another one that we requested.

THE COURT: I would agree with that. Where do you want to put that?

MR. SINGER: I recommend that it come after the paragraph we were just looking at, so before the paragraph beginning: It is the duty of the attorney.

And the specific language that we requested reads: Also you should be careful not to speculate about matters not in evidence. Rather, your focus should be entirely on assessing the evidence that was presented, and not on speculating as to what other evidence, if any, might or might not --

THE COURT: Yes, I like that instruction since you copied it from one of mine.

MR. SINGER: Imitation is the sincerest form of flattery.

THE COURT: Where would you put that?

MR. SINGER: I don't feel terribly strongly about where it goes, but we where thought about putting it is after

the paragraph beginning, "Testimony consists of," and before the paragraph beginning "It is the duty of the attorney for each party."

THE COURT: OK. I think that's the right place. Read me the language once again so that my very talented law clerk can write it down.

MR. SINGER: Do you want the commas or not?

Also, you should be careful not to speculate about matters not in evidence. Rather, your focus should be entirely on assessing the evidence that was presented, and not on speculating as to what other evidence, if any, might or might not have been obtained.

THE COURT: I don't like the last word, might or might not. I'll play with it, but aside from finding an appropriate synonym for the last word, I will give that instruction.

MR. SINGER: Then on instruction number five, two things in the nature of this, the first line reads, "In deciding whether a party's burden of proof," the only party with the burden of proof is the government.

THE COURT: All right. In deciding whether the government has met its burden of proof. OK.

MR. SINGER: And then I wonder if, when we say --

Page 6, first line of the instruction.

THE COURT: I got it.

MR. SINGER: Then at the end of that instruction, the

second sentence of the last paragraph, circumstantial evidence is of no less value than direct evidence, we think it will be more correct to say that it is of no more or less value. In other words, we may be making a suggestion to the jury that it would be more value.

THE COURT: No, I don't think that adds anything. Denied.

MR. SINGER: That was all that I had for one through seven.

THE COURT: Very good. Counsel for Ms. Mairone?

MR. MUKASEY: Nothing, Judge, thanks.

THE COURT: All right. So now let's turn to instruction number eight. Any objections, edits or additions from the government?

MR. ARMAND: Not through instruction eight, your Honor.

THE COURT: Bank counsel?

MR. SINGER: Yes, your Honor, this has come up before and I apologize if we're plowing old ground here, but I do believe that we have an instruction that each of the bank defendants except for Bank of America, NA should be treated as an independent --

THE COURT: Now you are right to raise that because that's an issue that you have raised before but I have never fully understood, so let me make sure I understand your

argument and then we'll hear from the government.

You agree entirely that Bank of America is the successor to these entities, yes?

MR. SINGER: For the purposes of this case we conceded and continue to concede that Bank of America, NA is the legal successor to Countrywide Bank, so if Countrywide Bank is liable we agree that Bank of America, NA is liable.

THE COURT: And it is -- are you saying that Bank of America is not liable if Countrywide Home Loans is liable?

MR. SINGER: I don't believe that's been alleged or admitted one way or the other.

THE COURT: And this is something that I think can be determined by judicial notice. What is the relationship, legal relationship of --

Does Countrywide Home Loans, Inc. still exist?

MR. SINGER: I don't believe that it's an entity in operation, your Honor. I don't know what its precise legal status is.

THE COURT: For all practical purposes, was it not absorbed by Countrywide Bank?

MR. SINGER: I don't believe so, your Honor.

THE COURT: For all practical purposes, was it just made defunct?

MR. SINGER: At the time --

THE COURT: Well, someone in the defense knows the

answer to this.

MR. SINGER: My understanding, your Honor --

THE COURT: Do I have to call a witness from the bank this afternoon in this court to get answer to the legal situation of these three defendants?

This is not a matter for the jury, this is a matter of judicial notice of what the legal relations are, something intimately known by the defense, and certainly after four weeks plus of trial when this issue has been raised you should know the answer.

MR. SINGER: My understanding, your Honor, is at the time that the merger occurred between Bank of America and Countrywide, the merger was between -- as far as Bank of America, NA was concerned, Countrywide Bank was merged into Bank of America, NA.

I do not believe -- and I can confirm this, but I do not believe that Countrywide Home Loans per se was merged into Bank of America, NA. There are other Bank of America entities, one of which was previously sued in the case.

THE COURT: Who is here for Countrywide? Where is counsel for Countrywide?

MR. STRASSBERG: Are you talking about us as outside counsel?

THE COURT: Yes. So what's the answer?

MR. STRASSBERG: Your Honor, with respect to --

THE COURT: You don't know the status of your own clients?

MR. STRASSBERG: We can consult clearly with in-house counsel and we can have a short break.

THE COURT: We'll take a short break right now. I want the answer.

(Recess taken)

(Continued on next page)

(In open court)

THE COURT: Let me hear from Countrywide's counsel.

MR. STRASSBERG: Your Honor, the short answer is Countrywide Home Loans is a separate entity. It was not merged in with Countrywide Bank at the time that Countrywide Bank was merged into Bank of America. I believe counsel for the bank would explain. I can state it first, that the banks are not trying to suggest that Bank of America is not nonetheless liable as successor for the purposes of this case for either entity. I think the only point they were making is they are a separate entity. Countrywide Home Loans continues to exist. It has servicing that it does. It has repurchase claims that it's handling. It has litigation.

THE COURT: Who is the CEO of Countrywide Home Loans, Inc.?

MR. STRASSBERG: Your Honor, for all of those detailed questions, I would have to consult back with --

THE COURT: Good. I want someone who can answer any and all questions about Countrywide Home Loans in my court as soon as possible. Go make a call. And I want someone in authority. If there is a general counsel, if there is a CEO or anyone. I suspect there may not be anyone but a janitor.

MR. SINGER: If it would solve the problem, we're happy to withdraw our objection on this instruction.

THE COURT: All right. That's fine.

Now, do you have any other objections to instruction number eight?

MR. SINGER: Not an objection, your Honor, but a suggestion, which can either come in this instruction or a different one. We have requested an instruction just to remind the jurors that the question of any possible penalties or sanctions is not for them but it is for the Court.

THE COURT: I think that's fair.

How about this in the first paragraph, the end of the first paragraph after the sentence "this is known as establishing liability," let me add the following sentence: I remind you that, if liability is found for any defendant, the issue of how much damages or penalties, if any, are to be imposed is for the Court.

MR. SINGER: Your Honor, conceptually I'm fine. I guess I would prefer, all things being equal, I would prefer there not be a reference to damages or money, just penalties.

THE COURT: I think the statute, although it is couched in terms of penalties, also refers to damages, does it not?

MR. SINGER: I don't recall it that way. The reason I have a concern about it, your Honor, is not just because of the word "damages" per se, but because it is a reference to money and I just --

THE COURT: What other kind of penalties do you

suggest I can impose?

MR. SINGER: I wasn't going to ask for any, your Honor. But the question of what the jury needs to know and hear --

THE COURT: Don't you think they should know this is not a question of like, for example, sending Ms. Mairone to jail or anything like that? That we're talking about money.

MR. SINGER: At the end of the day, we are talking about money.

THE COURT: Shall I use the word "money"?

MR. SINGER: I prefer just "penalties," but it has to be "damages," we'll take damages.

THE COURT: I was giving you both. How about money? The issue of damages, how much money, if any, to be imposed is for the court.

MR. SINGER: I prefer the first formulation.

MR. MUKASEY: Can I propose a possible intermediate. The concept of civil penalties.

THE COURT: I think that conjures up all sorts of notions that are really well beyond what the Court can impose in this case. I think we are talking about money.

MR. ARMAND: In terms of the statute, I think it only references civil penalties. It is clear we are talking about money. So I think the government's proposition would be "money in the form of civil penalties," because I don't think the jury

is going to understand what civil penalties are.

THE COURT: Yes. That's my fear too.

MR. SINGER: The whole point of the instruction is for the jury not to be considering the issue of what penalties, if any, are going to be provided.

THE COURT: That's why I'm giving them the sentence you asked for.

MR. SINGER: I reason I asked for it --

THE COURT: So, you prefer a sentence that says whatever civil penalties may mean, and you have no idea what it means, but we'd like to give you an instruction that is meaningless, here is in a meaningless instruction which you are not to consider.

MR. SINGER: I wouldn't put it exactly that way, your Honor. The jury obviously knows that something is going to happen to these defendants if it finds them liable. The point of the sentence is really to tell them it is none of their business what that something is.

THE COURT: So in the preliminary instructions that all counsel agreed to, albeit it was not binding on these final instructions, what you all agreed to then was the following sentence:

Any monetary penalties that are then imposed on the defendant are determined however by the Court, not the jury.

So, I think the sentence here should read: I remind

you that if liability is found for any defendant, the issue of what monetary penalties, if any, are to be imposed is for the Court.

Anything else?

MR. MUKASEY: Yes, Judge. In the third paragraph of this instruction, where you devote the attention to Ms. Mairone, my concern is that it's not intuitive that Ms. Mairone through her conduct can bind the banks, but the banks need not necessarily bind Ms. Mairone, because there are other managerial agents who --

THE COURT: I will consider something, but I don't think this is the place for that. The place is later on, I think it is the very next instruction, where we talk about who can bind the bank.

MR. MUKASEY: It is instruction nine. The reason I raise it here, your Honor, where your Honor has it in nine is sort of towards the back of nine. And my concern is that the language is couched -- all the language of fraud and specific intent and knowledge and representations is couched in the language of an individual. It is not intuitive to a juror or really to anybody that a corporation can make a misstatement or a corporation can have intent. And my request is --

THE COURT: Have you conveyed those thoughts to JPMorgan?

MR. MUKASEY: I don't want to think about JPMorgan

right now. But, my request is, as early as possible, possibly here, possibly earlier in charge nine, you convey to the jury the notion --

THE COURT: No. You have an hour's worth of summation. These are incredibly short instructions.

MR. MUKASEY: They are.

THE COURT: And the reason for that is so that nothing gets lost and nothing gets confused. If we had, as some of my colleagues do, an 80-page instruction describing the history of the universe, I might see your point. But I don't see it now. Denied. We will take it up in instruction number nine.

Turning to instruction number nine. Anything from the government?

MR. ARMAND: Yes, your Honor. The government had two requests for additions. One is from our request number eight which deals with the concept of originating the scheme, and that any particular person who is alleged to have intent, it is not necessary the government prove that that person originated the scheme.

And so what we would propose to add is "In order to establish the existence of the scheme, the government is not required to establish that any person with the requisite intent originated or created the scheme to defraud. The government is required only --"

THE COURT: I want to think about. What is your

authority for that?

MR. ARMAND: I think it is the Ragosta case. If you give me a moment I can pull it up.

THE COURT: Yes. Go ahead.

MR. ARMAND: I think this is also something we briefed in connection with the summary judgment motions. This was an issue that Ms. Mairone's counsel had raised in their papers that she didn't create the scheme. And our response was, well, you don't necessarily have to create the scheme. You just have to be a knowing participant in the scheme.

THE COURT: I agree with you that you don't have to create the scheme. But you're going a step further and saying that you don't have to have an intent to defraud to create the scheme. I don't think that's right. At least, I'm not aware of any authority. How could it be a scheme to defraud if there wasn't intent to defraud?

MR. ARMAND: Well, it is really first sentence. "In order to establish the existence of a scheme, the government is not required to establish that any person with the requisite intent originated or created the scheme to defraud."

THE COURT: I hear what you are saying. I want to know what your authority is for that.

MR. ARMAND: All right. Your Honor, maybe if we can come back to it and I'll find it.

THE COURT: Come back means during this charging

conference.

MR. ARMAND: Absolutely. I'll provide a citation for you.

THE COURT: What was the other thing you had?

MR. ARMAND: The second is we had a requested charge with regard to the necessary result inferring intent from the necessary results of the scheme.

THE COURT: Yes. I don't think that is the law. I know there is an occasional case that has said that. My recollection is there are numerous cases that question that. I know it would not be permitted under Second Circuit law in a criminal case, and since the civil liability here is premised on violation of a criminal statute, I don't see how it can be true in a civil case.

MR. ARMAND: The government is relying on I think there were two cases. The United States v. Chacko case which is a Second Circuit case, and also the Ausa Life case, which is also a Second Circuit case.

THE COURT: My law clerk will take a look at that. Give the citations.

MR. ARMAND: Sure. Chacko, 169 F.3d 140. Ausa Life is 206 F.3d 202. In Chacko, it is a mortgage fraud case.

THE COURT: All right. Are either or both of these FIRREA cases?

MR. ARMAND: No, neither of them are FIRREA cases.

THE COURT: I think that can make a difference. Because where you have a pure, ordinary civil case, civil fraud case, the remedial purposes of the statute allows a broader scope for inferring things. For example, you can infer in an every day civil fraud case, you can have what is called constructive fraud. Something is not itself a fraud, but it acts as if it were a fraud.

This is represented, for example, in the third subdivision of Rule 10b-5 which has been invoked, only the third subdivision, only in civil cases. Another example is injunctive relief.

I'm saying this off the top of my head, so I could be corrected by any case that you have. But where you have, as in FIRREA, a civil penalty that attaches as a result of violation of a criminal statute, albeit shown only to a civil burden of proof, then, it seems to me, the ordinary principles of how one construes liability under that are governed, other than as to burden of proof, by the criminal law.

I believe that in criminal case, under the wire and mail fraud statutes, the instruction that someone intends the natural probable consequences of his acts have been expressly disapproved by the Second Circuit. Therefore, I don't see how it should be relevant in this FIRREA case.

MR. ARMAND: Well, there are so very few FIRREA prosecutions so there is --

THE COURT: I'm sure there is a reasonable possibility this issue has not come up.

MR. ARMAND: Correct.

THE COURT: Now you have my preliminary view. If you want to shoot at it, sure. But we'll see what my law clerk comes up with in a minute. I'm quite confident that that instruction has not been permitted -- has been expressly disavowed in the criminal context in the Second Circuit and elsewhere.

There is a short matter I'm going to take in a few minutes, and I'll give both sides an opportunity to do some research during that time, then we'll resume. But, for the moment I'm not inclined to adopt that.

On instruction number nine, let me hear from --

MR. ARMAND: Your Honor, are you moving to a different matter or are we still proceeding with number nine?

THE COURT: Number nine. I'm sorry, there is more, yes.

MR. ARMAND: Yes, your Honor. With respect to, on the second page, the fourth line down, where it is referencing a reasonably prudent purchaser of mortgage loans at Fannie Mae or Freddie Mac. And the government would propose saying instead "a reasonably prudent person involved in the purchase of mortgage loans at Fannie Mae and Freddie Mac." And the reason for that is that it is not one single person who was handling

the purchasing, and there were people with different roles who can contribute input into the purchasing decisions. And so we are just concerned that the jury may get hung up on who is the person who was actually purchasing. There are a chorus of people.

THE COURT: Subject to hearing from your adversary in a minute, I'll adopt that change.

MR. ARMAND: Thank you, your Honor. I skipped one. Going back to the preceding page, the paragraph that starts "here specifically the government alleges." And the fourth sentence "that the loans were higher quality than they actually were and/or had been subjected to greater quality safeguards." We would just --

THE COURT: I agree with that.

MR. ARMAND: That's it for --

THE COURT: By the way, there was one typo on page 13 in the second full paragraph, seventh line, the fourth word from the end, the word should be "intended." Past tense.

MR. ARMAND: I also noticed that Clifford Kitashima, I think his last name may be spelled K-I-T-A.

THE COURT: K-I-T-A. Thank you very much.

Bank counsel on number nine.

MR. SINGER: Okay, your Honor. Would you like me to respond to any of the government's suggestions first or --

THE COURT: At the moment the only ones I've accepted

are the and/or and the person involved in the purchase. Do you have any problem with either of those?

MR. SINGER: I'm fine with and/or if we are going to have that clause at all, which I'll get to in a minute. But the only issue I have with the reasonably prudent person involved with the purchasing is "involved" makes it sound like it could be anyone. It should be somebody who is actually making the purchase decision. I'm okay with the concept of what I think the government counsel was suggesting, which is it has to be a person. But it shouldn't just be anyone at the company. It has to be the responsible person.

THE COURT: So I agree with that. What words would you suggest?

MR. SINGER: What language? I'm sorry.

THE COURT: Beginning at the very bottom of page 12, "and that these misrepresentations were material because a reasonably prudent person involved in the purchase of mortgage loans," etc.

MR. SINGER: How about "deciding whether to purchase."

THE COURT: "Involved in the decision to purchase"?

MR. SINGER: I think "involved" is --

THE COURT: It is "involved" that you are having a problem with and I'm sympathetic to that. We're not going to say "materially involved."

MR. SINGER: How about "the person purchasing."

THE COURT: The point is it was more than one person who made the decision. That's their point.

MR. SINGER: I'm not sure that there is evidence in the record for that. But it could be so. But I think the point I'm trying to make is that the relevant person is not just somebody who may have had some involvement in the decision. The relevant person at Freddie and Fannie.

THE COURT: I can remember testimony of at least one and maybe two witnesses saying that decisions were sometimes arrived at through consultation.

Well, I'll think about, we need a word instead of "involved."

MR. SINGER: "Responsible for" would be another option. My concern is that "involved" suggests that somebody who had minimal responsibility --

THE COURT: That's the issue. Let me think about that. If someone can come up with a good word, I'll accept that change. What else?

MR. SINGER: So then harkening back to a point your Honor just made in colloquy with the government counsel, we would like -- I have a concern that the jury is being told this is in effect a civil fraud claim. While that is partly true, it is certainly a civil claim and it is certainly based on fraud, the government has to prove that the defendants violated criminal mail and wire fraud statutes.

THE COURT: Only civilly.

MR. SINGER: Say again, your Honor?

THE COURT: Only civilly.

MR. SINGER: It's true that the claim is a civil claim. But in order to prove the defendants are liable for the civil claim, they have to show a violation of 18 U.S.C. Section 1341 or 18 U.S.C. Section 1343, which makes it, in my view, a very unusual civil claim, and one that is predicated like a RICO --

THE COURT: RICO is of course a predecessor to this. In a civil RICO case, the jury is not -- at least in the cases that have occurred before me, have not been told that these are criminal statutes. They've just been told what the elements are.

MR. SINGER: One of the elements is a pattern of acts of racketeering. In that instance it is fairly clear in a RICO case the defendant is being charged -- it isn't always criminal in a RICO case, but it has to be a pattern of acts of racketeering, many of which are criminal, and often those are proved as criminal charges to the jury.

THE COURT: What is it you're asking for?

MR. SINGER: We had proposed language in our proposed instruction number 13 and we can take that or something shorter. I would point out the government also proposed very similar language to what we proposed.

THE COURT: Let me just say, so everyone remembers this. The clear law of the Second Circuit, reiterated, at least to my knowledge, 20 times over the course of decades, is that if a submitted request to charge misstates the law in any respect, the Court is free to disregard the entire charge. Therefore, I won't burden the record with the fact that a great many of the charges submitted by each of the parties here in their original request to charge in one or more respects misstated the law.

But I'm giving you an opportunity that the Second Circuit doesn't require, but that I think is only fair, which is, regardless of what you asked for before, which in many respects went on for many sentences and was often right in some of the sentences and wrong in some of the other sentences. If you have a specific wording you want to give me now, on this charge, I will consider that wording. But just to refer back to charge 13 won't do me or you any good.

MR. SINGER: Understood. Let me give you some language that's actually shorter than what we originally proposed. So it may be more palatable. It would read: Although this is a civil case, to prove its claim the government must prove that the defendants committed -- or I would say each of the defendants committed a criminal offense of mail or wire fraud.

THE COURT: That is denied. I agree that succinctly

makes the point you would urge upon Court. I believe it is extraordinarily contrary to the notions underlying FIRREA. That to suggests to the jury that they somehow have to find something else, something of a criminal nature in an inherent way beyond the elements they actually have to find. And therefore, it is misleading and prejudicial. So I will not give that. But your record is preserved.

MR. SINGER: Thank you, your Honor. Next suggestion is in the first element, where elements are being summarized in the first paragraph, first that there existed a scheme to defraud Fannie Mae and Freddie Mac, I would suggest adding the words "of money or property." Just to track the statutory language.

THE COURT: It should be "and/or Freddie Mac," but I agree that to add "of money or property" is good.

MR. SINGER: Continuing on, by false or fraudulent pretense, representations or promises. We would ask to replace the word "representations" with the word "statements." Not because "representations" is legally incorrect, but because the jury has heard so much about representations and warranties in this case that we're concerned they will be confused when they hear the word "representations" in this context it somehow means the same thing, which obviously it does not.

THE COURT: It is the language of the statute. If you want to have me add something later on further defining it, I'm

happy to consider that. I don't think I should tamper with the language in the statute in the first overview.

MR. SINGER: We'll give that some thought. It make sense perhaps to tell the jury at this point that by the word representation, I don't mean to say a contractual representation and warranty. That means something different.

THE COURT: I understand the point. When we get down to the bottom of the page 12, I'll consider language there. I just want to make sure we stay on course. If that's the next thing you have, I'll take that up now. If you have something else before that on page 12, you should raise it first.

MR. SINGER: Okay. Next one in the materiality section, we would request an instruction after the language that's there now -- the language there now is "a statement is material if it relates to a fact that a reasonably prudent person would consider important in making a decision."

We would ask to add the language "to be material, information misrepresented must be of some independent value or bear on the ultimate value of the transaction."

THE COURT: First of all, there again, if at all, I would take that up at the end of the next paragraph.

Just so you understand, I'm outlining the first in the most abstract way the three elements. That's the first half of page 12. Then, I give a further discussion of the first element, also in an abstract way. And then in the second

paragraph, beginning with "here specifically," that's where we get to the particulars. So if it goes anywhere, that's where it would go. Let's take up then the two points you've just raised and we'll see.

You want to put in, first, on the issue of misrepresentations what? I don't think there is any danger, now that I look at it, that "misrepresentations" will be taken to somehow be a reference to representations and warranties. Although representations and warranties are of course a form of representation.

MR. SINGER: Actually, it leads into a related concern that we also had which is that we would ask for an instruction that failure to abide by a contract or an agreement is not in and of itself fraud. I think that's implicit in the instructions but really needs to be explicit because so much of the testimony --

THE COURT: That one I would consider. But it is not doing me any use to have this sort of scattershot approach.

MR. SINGER: I understand.

THE COURT: On your request regarding substituting "statements" for "misrepresentation," that's denied.

On your request that the materiality have the sentence you were saying, I don't see what that adds to what is on the top of page 13. And any prudent person involved -- or some better word -- in the purchase of mortgage loans at Fannie Mae

or Freddie Mac would have considered the true facts important in deciding whether to purchase or how to price the loans.

MR. SINGER: The difference, your Honor, is that just the fact that somebody might have considered important or may have wanted to know about a particular process, for example, that Countrywide was involved in, does not make it material. It has to have actually affected the value of the transaction. That's how I read the --

THE COURT: In this context, "materiality" means that it is important to the mix of information that the purchaser would take account of in deciding whether to purchase or whether to price at a given price. I think that's the clear law. I don't know of any contrary authority. But if you have contrary authority, let me know.

Since we've given all you folks the request to come up with some further authority, why don't we take a 10-minute break while I take up this other matter that I have and then we'll resume. You will need to leave the table, however. And we'll call you back in about 10 minutes.

(Recess)

(Continued on next page)

THE COURT: Well, the government is not here, so we can proceed without them.

MR. SINGER: Your Honor, I have a few more requests I would like to add.

THE COURT: We'll wait a minute or two.

So I agree with defense counsel that the government's time for summation has to be limited to two minutes.

Oh, here's the government.

MR. ARMAND: We were in the conference room.

THE COURT: All right. So before we turn to other things, did the government want to say anything more on the two points that I had not accepted but which they said were reflected in the Chacko case and the AUSA Life Insurance case. It's a great name for a life insurance company.

MR. ARMAND: I like it. I think with regard to the Chacko case, it's a criminal case, it's a mortgage fraud case. And in that one the borrower had taken out loans that it was clear he would not be able to pay back, and the court held that it was appropriate to infer fraudulent intent from the fact that the necessary result of having taken out this loan --

THE COURT: Where are you looking at?

MR. ARMAND: Where in the case specifically?

THE COURT: Yes.

MR. ARMAND: I don't have a copy of the case, but --

THE COURT: Sorry, I don't see that there was anything

in the jury instruction there.

MR. ARMAND: It's not specific --

THE COURT: It says the question of sufficiency of the evidence on defendant's intent to defraud, and the language in the case is, "When it is clear that a scheme viewed broadly is necessarily going to injure, it can't be presumed that the schemer had the requisite intent to defraud." Citing Regent Office Supply Company and United States v. D'Amato. If you read that through to the end, however, what they're really saying is that circumstantial evidence can carry the day on a sufficiency challenge, which of course is unquestionably true. It says nothing about any charge to the jury.

So I don't think that changed my mind on that issue. What about the other case?

MR. ARMAND: Well, I think AUSA Life is similar. Neither of the cases dealt with jury instructions, but they do speak to the general precept of mail and wire fraud when the government is proving fraudulent intent that circumstantial evidence in the scheme itself can be used to show --

THE COURT: Yes, so let's get a little clearer on this. The forbidden instruction, I went back and searched my memory, always an arduous task, and I now remember that the forbidden instruction is an instruction that you can presume fraudulent -- you can presume someone intends the probable consequences of their acts, or words to that effect. It was

the word "presumption" that ultimately led to that instruction being held improper, harking back, as you're to young to remember to the famous Supreme Court case involving Timothy Leary, and if you don't know who he is, you have led a sheltered life, but I urge you to look him up. I see that slightly older counsel is nodding his head.

MS. MAINIGI: Me, your Honor?

THE COURT: No, your colleague on the right.

But in any event, so I think if we cut out the presumption language, it might be accurate as far as it goes, but I don't see why one should, for either side, single out one aspect of circumstantial evidence over any other. So I still reject the instruction.

MR. ARMAND: Understood, your Honor.

Did your Honor wish to go back to bank counsel to continue with their --

THE COURT: Yes.

MR. ARMAND: And I'll have some responses to some of their arguments.

THE COURT: Yes, I will come back to you in a minute. I want to hear from bank counsel and counsel for Ms. Mairone.

MR. SINGER: I think where we left off we were talking about the materiality, particularly the instruction that we requested that to be material the information misrepresented must be of some independent value or bear on the ultimate value

of the transaction.

THE COURT: First of all, I don't know what the heck that means, for a start, but go ahead you were going to give me a citation.

MR. SINGER: I can try to explain it, but the who citations that use that formulation and almost those exact words -- or not almost, but in those exact words, U.S. v. Rigas, 490 F.3d 208, and U.S. v. Mittelstaedt, 31 F.3d 1208, and I think --

THE COURT: Rigas is a Second Circuit case, the other is a Second Circuit case?

MR. SINGER: Both Second Circuit cases. I think what the cases are getting at is there can be testimony that a person in a position to transact or purchase thinks that some information that was not revealed to them or was misrepresented to them is important, and says gee, I would want to know that. In Mittelstaedt, I think the situation was I wouldn't want to do business with someone who was dishonest, so I would have wanted to know that the person I was transacting business with was doing bad stuff. And court holds in both cases that what really matters is are you getting what you paid for in the transaction? And is what is going on -- is the information that is being misrepresented having an actual effect on the value of the transaction?

And so here it's an important instruction, because we

have a lot of testimony, and I expect we'll hear a lot of argument tomorrow about the how the HSSL process was a bad thing and gee, we should have told Fannie and Freddie about the process and the changes to the process. But what is really important, and think this came out in Mr. Battany's testimony on Friday in particular, is did it affect the quality of the loans --

THE COURT: Let me see if I understand this, because I have a vague recollection not of -- Rigas is a famous case but there have been a number of cases in this area. So we have to again distinguish, of course, as to all fraud cases between omissions when there's no duty to speak and misrepresentations. So I am selling you an interest, security interest in my company, and I don't reveal that I have been convicted previously for securities fraud. There was no duty, it's an arm's length transaction, so we don't reach the question of materiality, there's no duty. But now I say to you, in this hypothetical transaction, you can trust me because I'm known in the community as someone who deals honestly and straightforward, and so even though this is a fairly new company and there's not too much I can show you in terms of hard data, trust me on this because of my reputation, and I fail to reveal in saying that that my reputation is really lousy because I have been convicted three times for securities fraud. And you're saying that that would not be material, even

though a reasonable purchaser would consider that very important in those circumstances in this issue whether or not to purchase the security?

MR. SINGER: I think I need to know a little more or we need to know some more facts about the transaction.

THE COURT: Since I'm that making up this hypothetical, ask me any question you want.

MR. SINGER: I will tell you what might be important and what might not be. If the issue is the seller lied about his reputation, lied about not having previous convictions when in fact he did, but the company he's selling and the company that the buyer is buying is worth the same amount regardless, doesn't affect the value of the transaction, then I would say it's not material.

THE COURT: That's the issue. So I will have my law clerk pull those cases and we'll take a look.

DEPUTY CLERK: The second site again?

MR. SINGER: Mittelstaedt is 31 F.3d 1208. And while we're at it, I can also give you U.S. v. Starr, 816 F.2d 94.

THE COURT: We'll put that on hold for a minute.

Go ahead.

MR. SINGER: Then moving on to the paragraph beginning here specifically "The government alleges," we have the sentence that reads or the portion that reads that a scheme was devised to induce Fannie Mae and Freddie Mac to purchase

mortgage loans originated through the High-Speed Swim Lane by misrepresenting the loans were of higher quality than they actually were, and I think --

THE COURT: And/or.

MR. SINGER: -- and/or had been subjected to greater quality safeguards then they actually had been. This relates to the materiality discussion that we have been having because the government hasn't articulated -- and this came up on Friday on the Rule 50 hearing as well, that the government has not articulated how safeguards were misrepresented or how the safeguards -- the idea is that the safeguards or the lack thereof supposedly impaired the quality of the loans. And that's what Mr. Battany cared about, and that's been the government's theory all along and. Mr. Armand said this on Friday, what the government is arguing is yes, the HSSL process was bad, but the reason it was bad is because it had an adverse effect on the quality of the loans and it's the quality of the loans that the government is claiming was being misrepresented.

THE COURT: I think we went through this a little bit on the Rule 50, and there is testimony in the record both ways on this, but if for example, in my hypothetical, you designed a way of processing loans that was calculated to eliminate any checks whatsoever on bad loans so that the risk of a given loan being bad was hugely increased, but in my hypothetical -- oh, and then you represented to your purchaser that we're doing all

the quality controls that you wanted us to do but by a fluke the particular mortgage loan that in my simple hypothetical involving a single loan was sold to the purchaser was good, the purchaser testifies in my hypothetical I did get a loan that happened to be what I had bargained for, but I never would have bought it if I had known these facts because it was too big a risk and I didn't want to assume, I would have never wanted to assume that risk. Fraud or no fraud?

MR. SINGER: I think we're talking about two elements and I want to distinguish them, if I can, in my answer before I give you the bottom line, which is there is the question of whether there's a misrepresentation and there's a question of whether it's material. And I think --

THE COURT: See I think, just to interrupt you, I think that is a scheme to defraud, meets all the elements of scheme to defraud. Your damages, if this were a civil damages civil action, might be zero, but there was a scheme to defraud I think is clear.

MR. SINGER: The point I was making about this instruction, though, is something that your Honor's hypothetical has which this case is missing which is a representation a false representation about process, where in your hypothetical --

THE COURT: So that's a different point. I agree with you that they have to show that there was a misrepresentation

about process and they have to have testimony which a reasonable juror could infer that if that misrepresentation were false it would have been material to the purchaser or someone, quote, involved, closed quoted, in purchase. We'll still have to come up with a better word than "involved."

Let me ask the government, so what were the misrepresentations that were made regarding the quality of the process?

MR. ARMAND: Your Honor, with regard to the process, I think the government's main position has always been that there was no -- in terms of the duty to disclose, it was more of a defensive argument, and the bank was claiming that they disclosed the process. We were saying no, you did not disclose the process.

THE COURT: So are you saying you're limiting your claim to misrepresentations regarding the quality of the loans?

MR. ARMAND: Not with regard to the quality of the loans. The misrepresentation about the quality of the loans is in the rep and warrants which says they have to be quality investments, they have to be investment quality. But with regard to the misrepresentation about the process, to the extent that they were making statements, the bank personnel were making statements about the process, those statements needed to be true and accurate.

THE COURT: Those are the statements I'm asking you to

identify. What are those statements?

MR. ARMAND: Those are in the presentations that they made, they claim they made to Freddie and Fannie about the process. That did not completely disclose what they were doing. There were statements in the presentations about how they would continue to track Quality of Grade or quality scores so they could make changes to people's compensation. During that time there was a suspension of Quality of Grade. And so it's really the statements that are in those --

THE COURT: Which exhibits are those?

MR. ARMAND: I could find them for you. I don't have know the numbers off the top of my head, but there are two presentations, one to Fannie and one to Freddie. They were both used in Mr. Kitashima's testimony.

THE COURT: Forgive me, I must admit that in contrast to my ordinary congenial, low-keyed manner, I have been quite irritated at what has occurred here this morning on both sides. You had the whole weekend. I got this you this charge on Friday, early evening, people come in here and they say oh, that's the case law but we don't know what case, we'll have to look it up. People come in here and say, as right now, well, there's some exhibit out there we are relying on but we don't know off the top which exhibit it is. These are precisely the kinds of issues that you all knew would come up at a charging conference and I gave you the whole weekend to do it. And I'm

just taken aback that we're constantly having: Can we get back to you on the role of Countrywide? Can we get back to you on citations? Can we get back to you on what exhibits?

Now this is a question, the question that we're now discussing is one that has been raised by the defense from day one, and you're telling me that you satisfy your alternative prong, that's what it is, your alleging there was fraud either because there was misrepresentations that the loans were of higher quality than they actually were and/or, as you a half hour ago asked me to substitute, have been subjected to greater quality safeguards than they actually had been.

So my question is: What are the misrepresentations that the loans had been subjected to greater quality safeguards than they actually had been? And your initial response is a more or less nebulous reference to certain presentations, and I would like to know what specifically you're arguing and what specifically is going to be argued in your summation as to which were the misrepresentations made in those presentations. And I would like to see the presentation and have you identify exactly which they are.

So we'll take another five-minute break and you can do that for me.

(Recess taken)

THE COURT: The exhibits are?

MR. ARMAND: Your Honor, the presentations are --

DX729 is the Fannie Mae presentation and the Freddie Mac presentation is DX4036, both of them are in the Cliff Kitashima binder which is --

THE COURT: OK, let's get that out.

Government has recouped something by the way they just showed up my law clerk. That's always a good thing. Anyway, 729.

MR. ARMAND: I guess, your Honor, before we get to the exhibits, the reason why we're referencing the exhibits is just to show that the extent they were giving information -- the bank was giving information to Fannie or Freddie about their processes that they needed to be accurate. With regard to the misrepresentation about subjected to greater quality safeguards, there isn't really a specific misrepresentation that goes to that. It's more the representation about the loans being investment quality and --

THE COURT: Well, are you withdrawing the alternative theory? I go back to the bottom of page 12, "Here specifically the government alleges and the defendants deny that one or more of the defendants devised a scheme to induce Fannie Mae" -- and I guess there should be and/or Freddie Mac -- "to purchase mortgage loans through the High-Speed Swim Lane by misrepresenting that the loans were of higher quality than they actually were" -- that you clearly alleged -- "and/or have been subjected to greater quality safeguards than they actually had

been."

Are you withdrawing the latter part of that?

MR. ARMAND: No, your Honor, the language -- the representation about being investment quality, it can be read to include that the loans were subjected to proper quality safeguards, because there's language that says that you're not omitting anything material about the loan and that you don't know of anything about the loan that would lead an investor to conclude that it wasn't a quality investment. So that's why we initially left it in. But the thrust of our --

THE COURT: Wait a minute. So that has nothing to do with these presentations, you're talking about the general language in the contract.

MR. ARMAND: Correct.

THE COURT: And let me hear that language again.

MR. ARMAND: It is with regard to Fannie Mae, it's that there is -- it has to be a quality investment, the investor knows --

THE COURT: This is contractual language, so --

MR. ARMAND: Correct.

THE COURT: Can we have the exhibit?

MR. ARMAND: Fannie Mae is PX1.

THE COURT: That shouldn't be too difficult to find.

MS. MAINIGI: Battany binder should have it, and Sobczak binder.

THE COURT: By the way, I remind counsel, while we're talking about exhibits, we need to have indices and we also need -- you need to be able to give my courtroom deputy at the close of summations all the originals so that they can be wheeled in to the jury as soon as my charge is completed.

MR. ARMAND: The parties are working to compile that, your Honor.

THE COURT: Very good. So my law clerk just handed me PX2, showing that he's arithmetically challenged.

Normally I would never beat up on a law clerk, but this particular law clerk, Austin King, is not only incredibly brilliant but has a very tough skin, so what the hell.

DEPUTY CLERK: I think PX2 is Fannie Mae, I think PX1 is Freddie Mac.

THE COURT: Is PX2 the same thing?

MS. JONES: Yes.

THE COURT: Point me in PX2 what you're referring to.

MR. ARMAND: Page 8, item 17.

THE COURT: 17. The lender knows of nothing involving a mortgage, the property, the mortgager, the mortgager's credit standing that can be reasonably expected to cause private institutional investors to regard the mortgage as an unacceptable investment, cause the mortgage to become delinquent, or adversely affect the mortgage's value or marketability.

I will read that again and interrupt as necessary. "The lender knows of nothing involving the mortgage, the property, the mortgager, or the mortgager's credit standing --" Let me pause there. Nothing directly in that process there at all. Continuing -- "that can reasonably be expected to cause private institutional investors to regard the mortgage as an unacceptable investment, cause the mortgage to become delinquent, or adversely affect the mortgager's value or marketability."

And your position is that implicit in that is the representation that we have not skewed the process so as to maximize chance of mortgages that will become delinquent be defective, be unacceptable to occur.

MR. ARMAND: Correct, your Honor.

THE COURT: Surely doesn't say that. This was drafted presumably by Fannie Mae, needs to be read against them as a matter of law. If that's protection they had wanted they could easily have said that.

MR. ARMAND: It's the "knowing nothing involving the mortgage," and that could be read to include a loan origination process that is negatively impacting the quality of the loan.

THE COURT: It could be, but the question is whether there's a basis on which this jury can infer that that is the way it would have been read by the persons who allegedly created the fraudulent process. Now I believe, correct me if

I'm wrong -- is there any evidence that Ms. Mairone, let's start with her, ever read this contract?

MR. ARMAND: I think she testified that she was aware that the loans were sold with representations and warranties. I don't believe she was specifically shown this provision.

THE COURT: Was she asked whether that included her understanding that there had to be a disclosure if the process was defective, or words to that effect?

MR. ARMAND: I don't believe so, your Honor.

THE COURT: What about Mr. Kitashima?

MR. ARMAND: He testified that he was aware that the loans that were sold to Fannie Mae and Freddie Mac needed to be -- they came with representations and warranties, and they needed to be investment quality, but he also was not shown the specific provision and asked did you understand this to include process or not. So I agree with your Honor, it's not -- the record is not strong on this point, and we're not going to be arguing it in the closing, and so ultimately --

THE COURT: If you're not going to argue it at closing then we better not charge the jury about it.

MR. ARMAND: So ultimately I think we probably could --

THE COURT: So I'm going to strike that part of. And that, by the way, makes much more relevant the language which I prudently added about the preliminary instructions no longer

being binding. So I think there are -- so the sentence now reads here: Specifically the government alleges and the defendants deny that one or more of the defendants devised a scheme to induce Fannie Mae and/or Freddie Mac to purchase mortgage loans originated through the High-Speed Swim Lane by misrepresenting that the loans were of higher quality than they actually were, and that these misrepresentations were material because a reasonably prudent person involved in the purchase of mortgage loans of Fannie Mae or Freddie Mac would have considered the true facts important to decide whether to purchase the loans.

Now I think that eliminates also your business about materiality, but for what it's worth, the extra sentence that you wanted to add, I don't see it in any of the cases you cited to me.

MR. SINGER: Let me give you the cites, your Honor, it is in the Rigas case, it's on page 231, quoting we have also held that, "To be material, the information withheld either must be of some independent value --"

THE COURT: Where?

MR. SINGER: The bottom of the left hand column of 231.

THE COURT: Yes. So they say there, they're talking about -- first of all, this is has nothing to do with the holding that they get to on the materiality five pages later,

but in any event I will read the whole paragraph: The scheme to defraud clause requires that the defendant engage in a pattern or course of conduct designed to deceive a federally chartered or insured financial institution to releasing property with the intent to victimize an institution by exposing it to actual or potential loss. Citing a case called Stavroulakis. First, the government must prove that the defendant engaged in a deceptive course of conduct by making material misrepresentations. Citing several cases. A false statement is material if it has a natural tendency to influence or is capable of influencing a decision of a decision-making body to which it is addressed.

I notice you haven't asked for that language about the natural tendency, et cetera. Then it says we have also held that to be material, quote, the information withheld either must be of some independent value or must bear on the ultimate value of the transaction, whatever that means, citing United Services quoting United States v. Mittelstaedt. Analysis of the misrepresentation must be in the context in which they were made. Quote, materiality must be judged by the facts and circumstances in the particular case.

Now with my great apologies to the learned panel of the Second Circuit, this bears all the earmarks of some law clerk being asked to go out and collect all the boilerplate on materiality and throw it in here since it has very little to do

with the discussion that proceeds later about materiality about the specific Rigas. But they're quoting Mittelstaedt, so the source of all this language is supposedly Mittelstaedt.

MR. SINGER: The quote is accurate. It's on page 1217 of Mittelstaedt on the right-hand column.

THE COURT: I don't have Mittelstaedt for some reason.

MR. SINGER: I would be happy to pass it up.

THE COURT: Here it is. I'm sorry, here it is. So where is it in Mittelstaedt?

MR. SINGER: 1217 on the bottom right.

THE COURT: 1217.

MR. SINGER: First sentence of the paragraph that ends the page.

THE COURT: To be material, the information withheld either must be of some independent value or must bear on the ultimate value of the transaction. See Carpenter v. United States, 484 U.S. 19. And I have some familiarity with that case since I represented Mr. Carpenter, and it says nothing of the kind. What they say -- they quoted from Carpenter, and the quote is: The words "to defraud" in the mail fraud statute have the common understanding of wronging one in his property rights by dishonest methods or schemes and usually signify the deprivation of something of value." That, of course, is unexceptionable, but doesn't really support. But in any event, I don't understand, now that we have cut out the clause about

the process, I don't understand how what you're saying adds anything.

MR. SINGER: I think cutting out the clause on the process helps with the problem because it does go to the same issue, which is that I'm concerned that the jury is going to be confused by all the testimony about the process, which took up a lot of the case, and they're going to think that if --

THE COURT: Certainly bears on intent.

MR. SINGER: I'm not arguing for at least right now that the testimony should have been excluded, all I'm saying is for the purposes of this instruction I don't want the jury to come away with the view just because somebody at Fannie Mae or Freddie Mac might have cared about the process means that it was material.

THE COURT: But as it now reads, the instruction is: Here specifically the government alleges and the defendants deny that one or more of the defendants devised a scheme to induce Fannie Mae and/or Freddie Mac to purchase mortgage loans originated through the High-Speed Swim Lane by misrepresenting that the loans were of higher quality than they actually were.

That seems unequivocal. And also materiality then is about whether the quality of the misalleged -- if they had known the true facts about the quality, that would have caused them not to purchase, which is what the sentence goes on to say. So I don't think anything further is necessary.

MR. SINGER: One more quibble about the end of that sentence. The reference to the facts important in deciding whether to purchase or how to price the loans, the government has never alleged that the HSSL process or any fraud in this case led to Fannie and Freddie paying an unfair price. It's not a question of pricing, the theory --

THE COURT: There has certainly been testimony about that.

MR. SINGER: I don't think so. I think there was testimony from Mr. Battany --

THE COURT: For example, I recall testimony where government said if you had known X and Y, would that have been important? Yes, it would have affected the purchase or the pricing.

MR. SINGER: In cross-examining Mr. Battany they asked a question in terms of purchase and pricing. I think that's the first and only time they did that, because Mr. Battany testified --

THE COURT: So all they need is one.

MR. SINGER: The issue is what is their claim in this case. It has always been that the HSSL process made the loans not investment quality so they could not be sold under the contracts. The contracts specified that the loans have to be investment quality to be sold, and if they're not investment quality, the government's theory has been they shouldn't be

sold at all. They have never alleged in the case that Fannie or Freddie paid too high a price for the loans or they should have paid a lower price, the issue is: Could they be sold at all?

THE COURT: Let me hear the government on that.

MR. ARMAND: I think, your Honor, our argument is that it would have been important to their purchasing decision generally, which would include pricing. We haven't tried to put in evidence to assess --

THE COURT: It may -- they shouldn't have offered it at all, but if they did, the bank, Fannie Mae and Freddie Mac, could either say, you know, you're selling us a used car instead of a new car, but we'll pay you a used car price. I think that's consistent with the claims in this case.

MR. ARMAND: And your Honor, I believe there is some testimony from Mr. Sobczak and Tanabe on the issue of pricing, and that these would have impacted their decisions, including pricing. But the government has not been trying to limit itself to simply the argument that the loans couldn't have been purchased at all, it's just if you had this information about the quality of the loans, the lack of quality of the loans, would it have been important to you in making your decision. The decision could be to not purchase them at all or it could be to charge a different price. It's all about getting the information, and what you do with it is the prerogative of the

buyer, but they need to have it.

THE COURT: Yes.

MR. SINGER: It's an interesting theory. It's the first time we're hearing it. It's not in the complaint. It's not asserted in the opposition to any motions. I never heard it mentioned by the government. It come up a few times off hand in testimony, the issue of how the GSEs priced the loans and Mr. Battany's involvement in the process, but it has never been the government's claim, and we're defending against it now for the first time. I don't think that's fair.

MR. ARMAND: This was an issue that was part of the discovery.

THE COURT: If I had a nickel for every time one counsel or another in this case told me in open court or the side bar that something was unfair I would be a very wealthy fellow. I don't think -- the last I checked, I have to decide these matters as a matter of law, not a matter of equity. And it's hard for me to believe that anything in this case at this stage could be fairly said to be unfair. There was plenty of testimony about it. I agree the testimony was later, but long before the defense originally was going to rest its case.

But let's see, I think the operative document here is the complaint. Let me see if I can find a copy of the complaint. I will say there is one other relevant document, which is the pretrial consent order where the government puts

forth its statement of disputed facts, but let me look first at the complaint.

Well, the complaint goes on for --

MR. ARMAND: Your Honor, I could direct your Honor to paragraph 33 does mention pricing.

THE COURT: 33 of the complaint?

MR. ARMAND: Of the complaint, yes.

THE COURT: Let me take a look at that.

Yes, that's true.

MR. ARMAND: But I think also it's generally part of the government's argument that the information is material, the quality of the loans is materially their decision. And earlier in paragraph 33 discussing the rep and warrant model and what they're used for it talks about pricing.

THE COURT: Well, I'm inclined to leave it in for now. I will think a little bit more about it as we discuss it, but I am inclined to leave it in for now.

MR. SINGER: The last citation, paragraph 183, is the charging language of the complaint.

THE COURT: 183?

MR. SINGER: Looks to me like it's talking about misrepresentations that the loans complied with the guidelines, which would make them unsaleable, not that it would change the price.

MR. ARMAND: I would add, your Honor, that the whole

idea of variances is dealing with the situations where loan products fall outside of the guidelines, and they're making pricing decisions. Maybe Freddie or Fannie are willing to purchase the loans outside the guidelines for some price.

THE COURT: That paragraph has nothing to do with the issue here, the issue here is the definition of materiality.

MR. SINGER: The entire claim is about misrepresentations that took the loans outside the guidelines and therefore made them ineligible for sale.

(Continued on next page)

THE COURT: Yes, but you have had a great deal of evidence that they didn't care about this. They expected a certain amount of problems, which I allowed in on the issue of materiality. And the government's response is, they did care about it. It was important to them. Either because it would have affected the purchase itself, or, it would have affected the price of the purchase.

I don't see anything in that paragraph that's addresses that at all. It is a different issue.

MR. SINGER: I agree that the paragraph doesn't deal directly with materiality. It just deals with what the government's claim is about what was misrepresented.

THE COURT: Where this comes up is on the issue of materiality.

MR. SINGER: Materiality only matters if it is tied to what was misrepresented.

THE COURT: The misrepresentation is the quality of the loans. But not every representation or misrepresentation of the quality of the loans is material. So the question then is, how does the jury decide what's material.

Under your approach, to be material, the information withheld either must be of some independent value, or, must bear on the ultimate value of the transaction. United States v. Rigas; citing United States v. Autuori; citing United States v. Mittelstaedt.

If we accept your view, pricing is absolutely involved. It bears on the ultimate value of the transaction.

MR. SINGER: I would concede that under my view pricing would bear on the ultimate value. The argument I'm making now is it depends on what the misrepresentation is that the government alleges. The question is whether that misrepresentation is material.

THE COURT: Would you rather I take out the language about the reasonable purchaser who considered the true facts important in deciding whether to purchase or how to price the loans, and substitute that a reasonable person involved in the purchase would have considered the true facts important as bearing on the ultimate value of the transaction?

MR. SINGER: No, I prefer what's in there now.

THE COURT: I thought you would. Let's move on.

MR. SINGER: All right. Circling back to something that I think this is now the time for. I had mentioned earlier that we'd like an instruction that says the failure to abide by a contract or an agreement is not itself fraud.

THE COURT: All right. I just realized from looking at the clock that we need to take our lunch break now because I'm meeting another judge for lunch. We are going to go as long as necessary until we finish all this, and I'm sorry for all the breaks. But we'll continue at 2 o'clock.

MR. SINGER: Thank you.

(Recess)

(In open court)

THE COURT: So, I think we're up to any other edits, etc., you have or bank counsel has for instruction number nine.

MR. SINGER: Yes, your Honor. We'd like an instruction that failure to abide by a contract or breach of contract is not by itself fraud.

THE COURT: Well, what is the government's view on that?

MR. ARMAND: Your Honor, we would oppose an instruction with regard to breach of contract. I think whether or not there is a breach of contract is irrelevant to the question of fraud. The government has to prove the elements of mail and wire fraud. If we do that, we have proven fraud. The existence of a contract is irrelevant.

Now, to the extent we start delving into, well, if you don't comply with certain parts of your contract, even if it is intentional, it is not fraud. We would have to instruct the jury on aspects of a breach that could be fraud. If you never intend to comply with your promises under your contract, that's fraud. If you misrepresent a present fact, for example, like your Honor's cow hypothetical, or misrepresenting the quality of loans that you are selling at that particular time, that also could be fraud.

So if we now have to start giving the jury information

about how to navigate a breach of contract and whether or not it could rise to fraud or not, it is really going to confuse them.

THE COURT: What you're saying is to the extent we got into this at all, which seems totally unnecessary given the very simple instructions they've received about what constitutes fraud, it would be a very complicated and detailed and probably confusing instruction.

Let me hear from defense counsel.

MR. SINGER: I don't think we are asking for anything complicated. I'm just asking for a simple statement that a breach of contract in itself is not fraud. Fraud has to meet the elements that your Honor will be instructing on. I was very interested to hear that contract provisions are not relevant in this case, since they were projected up on the screen for the jury.

THE COURT: No, I don't think he said that.

MR. SINGER: If I may, your Honor --

THE COURT: The difficulty I think is this. It is of course correct that breach of contract is not a fraud. The ambiguity arises from some of the activities that were undertaken that the government alleges constituted fraud, could also be arguably construed as breaches of contract. So, there is a potential for a misunderstanding of such an instruction. Hang on just a second.

How about this at the end of the first full paragraph on page 13. That paragraph now reads: While the government must prove that a scheme to defraud Fannie Mae or Freddie Mac existed, the government is not required to prove that the scheme to defraud actually succeeded, that a given defendant personally benefited from the scheme to defraud, or that any victim actually suffered any loss as a result of the scheme to defraud.

Then I would add the following: However, a mere breach of contract by itself is not fraud; there must be, instead, an intentional plan and purpose to defraud.

MR. SINGER: That works for me, your Honor.

THE COURT: I will adopt that. Go ahead.

MR. ARMAND: Your Honor, if I could just make a record on this point. We do think it would be prejudicial to have an instruction with regard to breach of contract. What we're concerned about is because of the fact that the particular misrepresentation that we're honing in on in this case are in contracts, that the jury will conclude that just because those representations weren't complied with, that the fact that they weren't complied with means there is no fraud.

I understand your Honor has added the semicolon to make clear there needs to be more. What we're concerned about is they will hear that because there is a contract, that's where the misrepresentations are, and if they weren't complied

with, that that can't be fraud. They will be confused --

THE COURT: I don't know that they will. I think the defense is going to argue, and I think this is a fair argument, if there were mistakes made here, ladies and gentlemen, and as a result, there were breaches of the contract, that's not enough to find us liable. As the Court will tell you, a mere breach of contract by itself is not fraud. There has to be an intentional plan or purpose to defraud.

I think that is a material part -- you'll forgive the term -- of the defense in this case, is that they don't necessarily agree that any mistakes were made, but to the extent there were, and to the extent there were breaches in the contract, it was non-intentional.

I'll think about all this a little bit more as we go on this afternoon but for now I'm leaving it in.

MR. ARMAND: Understood. The jury may be confused about what a breach of contract actually is. Seeing as though this isn't a breach of contract case.

THE COURT: That's a fair point, except that so far as it concerns this case, I think -- breach of contract is a fairly simple, every day kind of concept.

Who is giving the closing argument for the banks?

MR. SINGER: Mr. Sullivan.

THE COURT: That's what I figured and he unfortunately is not here. I think I can see dangers if defense counsel

misused this instruction in their summation. Which, as I indicated yesterday, we're going to talk about limits on both summations anyway, which I'm sure will be conveyed to Mr. Sullivan and others.

MR. SINGER: The danger I see, your Honor, goes the other way. If we didn't have an instruction like this, the jury is going to feel like they've seen these references to contract provisions, the government's argued they were breached, and that's a fraud.

THE COURT: Remember, I already at an earlier stage in the case instructed the jury about how contracts are binding and so forth. I forget the exact context in which that arose. But that had to be explained to the jury.

For the moment I'm going to leave it. Let's move on but I'll hear further on this before we close for today.

MR. SINGER: Okay. Your Honor, the next comment we had is in the next paragraph, just a small wording suggestion. There is a reference the words "any victim." Could we --

THE COURT: Where is this?

MR. SINGER: Sorry. It is in the next paragraph. Beginning "while the government must prove that the scheme to defraud Fannie Mae and Freddie Mac existed, the government is not required to prove that the scheme to defraud actually succeeded, that a given defendant personally benefited from the scheme to defraud, or that any victim actually suffered any

loss as a result of the scheme to defraud."

We would just ask that the word "any victim" be changed to the words Fannie Mae or Freddie Mac. Since those are the only entities at issue here.

THE COURT: I'll give you that. Or that Fannie Mae or Freddie Mac. Go ahead.

MR. SINGER: Okay. Then going into the second element, the next paragraph, toward the last sentence of the paragraph, and I just want to preserve our record on this since we've already discussed it when it was referenced earlier, there is a reference to affecting the pricing loans. I just want to preserve an objection to that language.

THE COURT: Where are you talking about now?

MR. SINGER: The sentence beginning similarly. Similarly --

THE COURT: Requires that the given defendant you are considering purposely intended to deceive either May or Freddie Mac or both by seeking to sell them mortgage loans or affecting the pricing of those loans through false.

Yes, you are preserving your objection to the pricing.

MR. SINGER: Yes. The last word of that sentence I mentioned earlier that I'm concerned about the word representations, and it gets back to the contract point. Is that a fair place to change "representation" to "statements" since we're not quoting the statute anymore?

THE COURT: No, I'm going to leave it as is. I think it's clearly throughout, and I think to change it here would lead the jury to believe that somehow it's something different from what was referred to earlier. So I'm going to leave as is.

MR. SINGER: The next sentence as to the bank defendants, and the only issue we had with this one is that it appears to be limited to intent. We would like it to say that the bank defendants -- liability can be established only if one of those three persons participated in a scheme to defraud with fraudulent intent just described.

Because I think what we are really talking about is imputation of fraudulent conduct, which covers more than just intent. It also covers the participation the acts of the individual.

THE COURT: All right. So, this would be revised as follows: As to the bank defendants, such an intent can be imputed to them if but only if at least one of three managerial persons, Rebecca Mairone, Clifford Kitashima, or Greg Lumsden, participated in the fraudulent scheme with such an intent.

Right? That's what you want?

MR. SINGER: That would work, yes, your Honor.

THE COURT: All right. As to Ms. Mairone, however, it can be found personally liable only if she personally participated in such a scheme. Such a fraudulent scheme with

such intent. Right?

I'm just saving time so that Mr. Mukasey won't have to raise that later.

MR. MUKASEY: No, I'm going to actually -- are you done with the second element?

MR. SINGER: Yes.

MR. MUKASEY: Because I have a couple of thoughts.

MR. ARMAND: Are we -- if we're still sort -- I'm sorry to interrupt. The government wanted to lodge an objection to the change.

THE COURT: Why?

MR. ARMAND: Just it's arguably redundant, if we are talking about --

THE COURT: It is arguably redundant, but I think it is not verbosely so. And it could possibly clarify some possible doubt or questions. So I don't see the harm.

MR. ARMAND: I guess my only point was that we've already talked about what scheme to defraud is and it concludes that the intent to defraud.

THE COURT: Yes, yes, yes that's all true. But I think this is fine. Thank you.

MR. MUKASEY: Judge, this is sort of a nitpick just in terms of the linguistics.

THE COURT: That has not stopped any of your colleagues.

MR. MUKASEY: The second full sentence in the second element, paragraph one that begins it is not enough. It ought to say "it is not enough that the defendant you are considering" as opposed to it is not enough that defendant.

THE COURT: Yes, all right. I agree.

MR. MUKASEY: Now, towards the last sentence of this, and I appreciate the changes that your Honor has just made. My concern, obviously, is that it is confusing to the jury that Kitashima, Lumsden, and Mairone all can bind the banks through the principle of respondeat superior, yet Mairone is the only one sitting here at the table. And I'm wondering if we could not add some language that says the fact that Ms. Mairone is named as a defendant should not weigh in your determination of --

THE COURT: No, I'm not going to give that charge. But there was something else you had mentioned earlier that I thought had more colorable --

MR. MUKASEY: My original thought, until your Honor shot it down this morning, was to move the concept of the managerial agent earlier in --

THE COURT: Yes. That's still shot down. But I wish when I shoot that they would stay dead. But I thought --

MR. MUKASEY: You raised it.

THE COURT: I thought the point you made earlier that maybe should come in here, was something sort of summing up the

point. In other words, if Ms. Mairone is liable, that can bind the bank. The fact that the bank is liable does not bind Ms. Mairone.

MR. MUKASEY: Right. I have a good place to put it. It is essentially, we just sort of looked it up the best we could find sort of a basic proposition, but the best we could find is the restatement of torts. You have correctly and we have all correctly encompassed the idea of respondeat superior. The jury should be told there is no such thing as respondeat inferior.

Before the last sentence of the second element which you just revised, I thought you could put in "a finding that one or more of the bank defendants is liable does not mean you must find that Ms. Mairone is liable." Then your final sentence which you just revised, Ms. Mairone may be found liable if etc., etc. So it would be the second to last sentence of this element. You sort of say --

THE COURT: All right. Give me a minute here.

MR. MUKASEY: Sure.

THE COURT: Here's what I think would encapsulate that. I'm not sure whether the other parties including the bank defendants want this. But, I would put this at the very end of that paragraph, right after the word "intent."

"In other words, if you find Ms. Mairone liable, you must also find the banking defendants liable; but the banking

defendants may be liable even if you find Ms. Mairone not liable.

Let me make sure before I hear from the other parties, that's what you wanted in essence, yes, Mr. Mukasey? Do you want me to read it again?

MR. MUKASEY: I'm reading it off the screen if you just give me one second, Judge.

THE COURT: Yes.

MR. MUKASEY: Right. No. I understand the banks don't want that, and that's actually not really what I was asking for.

THE COURT: Isn't that the point?

MR. MUKASEY: But I think that that point is made in the second to last sentence as you have it now. As to the bank defendants, such an intent can be imputed to them if one of the three had the necessary intent and participated in the scheme. But, the converse is not true.

THE COURT: That's there right now.

MR. MUKASEY: A finding that one or more of the bank defendants is liable doesn't mean you must find that Ms. Mairone is liable.

THE COURT: But what is different between what you just said and what the present second sentence says? Ms. Mairone, however, can be found personally liable only if she personally participated in such a fraudulent scheme with

such intent? Isn't that exactly substantively the same as what you just read.

MR. MUKASEY: I think it is probably substantively the same. I think it is more understandable using my language. But I'd offer that with great respect, obviously.

THE COURT: All right. I'm going to stick then with the original because I infer that the bank defendants were not thrilled at my suggestion.

MR. ARMAND: The government would be fine with your suggestion.

THE COURT: All right. I wouldn't be surprised if the jury at some point asks us whether they can find the banks liable even if they don't find Ms. Mairone liable, and then we would instruct them yes, but only if you find Mr. Kitashima or Mr. Lumsden to have the requisite intent, etc.

MR. ARMAND: Your Honor, one other related point. I am not sure if this is the right place for it. But with regard to the limiting instruction that's been placed on certain evidence hearsay with regards to Ms. Mairone, it can be used as against the banks. With regard to Ms. Mairone's intent for imputing liability to the bank, we would think the limiting instruction would not apply. It would only apply for purposes of her liability personally.

THE COURT: I understand the point and it is an interesting point, but I don't think it's right. Because if

evidence that was introduced only against the bank but not against her were used to infer her intent or her participation, even if it was only for the purpose of then imputing that in respondeat superior to the bank, it would still mean -- well, I don't know. Actually, that's a really interesting question.

However, let me start with this. It's going to be endlessly confusing, is it not, to try to make that distinction?

MR. ARMAND: We could try to come up with some language.

THE COURT: How can you make an argument in summation, and it goes like this, if I understand. Now, in assessing whether Ms. Mairone is liable, you cannot consider what this hearsay evidence shows about her intent or her participation or her scheme to defraud. But, ladies and gentlemen, you can consider it as to her intent, as to her participation in the scheme to defraud, etc., etc., for purposes of determining whether the government has made out its case as to her for the limited purpose of imputing liability on that basis to the bank.

MR. ARMAND: It is really --

THE COURT: While you're at it, ladies and gentlemen, we have several philosophical conundrums we'd like to present to you.

I just think it will be endlessly awkward to instruct

them on that.

MR. ARMAND: There may be a way to do it with regard to the limitation, for purposes of liability, yes, for her own personal liability we agree that it can't be used to show her personal liability. But, she should otherwise, for purposes of holding the bank liable, be treated the same as Mr. Comeaux -- I'm sorry. Mr. Lumsden or Mr. Kitashima.

THE COURT: I understand the point. I'm not quite sure what the case law is. I'll bet there is none. I think you could argue it fairly both ways. In some ways the government brings it on itself by naming an individual. On the other hand, the argument the other way is that doesn't mean the government should be deprived of the evidentiary rights it would have against the bank. If the bank were the only defendant, then none of this would have been hearsay. It wasn't hearsay as to the banks. It would come in even if the jury could infer something about Ms. Mairone or anyone else.

On the other hand, here, it raises I think a very distinct danger of creating a dichotomy that jurors as non-lawyers would have difficulty applying, and therefore might very well trench on Ms. Mairone's rights not to have this used against her personally.

So, I think it is, if you will, akin to a 403-type problem. I think you may be right on the law, but I worry about how we could ever put this before a jury in a way that

would be so easy for them to distinguish and apply that we could have confidence in it.

Do you have some proposed language in that regard?

MR. ARMAND: I can for you, your Honor, in a few moments.

THE COURT: Okay. For now I'm going to deny without prejudice to your raising it at the end of the hearing.

MR. ARMAND: Thank you, your Honor.

MR. SINGER: Your Honor, I think we're ready for the third element if you are.

THE COURT: I'm just glad we are not dealing with the periodic table.

MR. SINGER: I couldn't tell you what the third element is. That's my chemistry education speaking.

THE COURT: You're much too young, I guess to know the songs of Tom Lehrer.

MR. SINGER: I could tell you some of them, but not that one.

THE COURT: Tom Lehrer, still alive and living in Cambridge, Massachusetts, took all the elements of the periodic table and found out which ones rhyme, and put them together to the tune of "I Am the Very Model of a Modern Major General." That's a song by Gilbert and Sullivan. You may not know who they are either. And performed it in his last public performance in 1973 on PBS.

Anything else you'd like to know about it?

MR. SINGER: No.

MR. MUKASEY: You are sure that's not Timothy Leary?

THE COURT: They were neighbors.

MR. SINGER: On the use of the mails and the wires, just a couple of wording suggestions. The language after the dashes, after the clause "such interstate communication includes, among other things, interstate telephone calls and interstate e-mails."

Two requests on that. Just to avoid confusion and consistent with some other instructions, instead of "interstate," I'd much rather use "telephone calls between people in two different states and e-mails between people in two different states." That's the way that the Sand instruction phrases it and that's the way that your Honor's Rodin instruction phrased it. I think it is clear to the jurors what interstate means in this context.

The other suggestion would be just to take out the words "among other things" because I don't think there are other things alleged.

THE COURT: The second point I certainly want to hear if there is any other thing that they're alleging.

MR. ARMAND: I believe there are facsimiles in the loan files.

THE COURT: Then we'll leave it in. If what you want

to say is "such interstate communication includes, among other things. telephone calls and e-mails that traveled between two states."

MR. SINGER: That would work, yes.

THE COURT: All right.

MR. SINGER: Instead of among other things, if the other things are facsimiles, we would could just add facsimile to the list and take out the among other things.

MR. ARMAND: There are also wire transfers I believe.

THE COURT: The government will have to refer to these on its summation or the jury may send us a note if they have any questions about it. But, I'm inclined not to give a laundry list on that, so we'll leave it "among other things."

MR. SINGER: I'm done with number nine, your Honor.

THE COURT: All right.

MR. MUKASEY: May I have a moment to confer with Mr. Singer for a second.

THE COURT: Yes.

MR. MUKASEY: Thank you, Judge.

THE COURT: All right. Anything from government counsel -- we'll go back to things we left open in a minute. But anything about instructions 10 or 11?

MR. ARMAND: Not with regard to 10 and 11. We still do have a couple of things to go back to on nine.

THE COURT: Yes. We'll do that in a second. Anything

from bank counsel on 10 or 11?

MR. SINGER: Only one thing, your Honor. On number 10 there is, in the second paragraph, the third line refers to exhibits that were admitted into evidence except for the video depositions. Just technically speaking, the video depositions are not exhibits. They're testimony. So I think we should just strike that language.

THE COURT: We didn't mark the physical tapes as exhibits?

MR. SINGER: I don't think so, your Honor. The next sentence refers to them anyway. So I think we can --

THE COURT: All right. Then I think it should read as follows. "In addition we will send into the jury room all the exhibits that were admitted into evidence along with indices to the exhibits. If you want to see any of the video depositions replayed, let us know and we will bring you back to the courtroom for that purpose. If you want any of the other testimony," right?

MR. SINGER: Yes.

THE COURT: All right. Very good. Anything from Ms. Mairone on 10 or 11?

MR. MUKASEY: No, thanks.

THE COURT: Let's go back to the government.

MR. ARMAND: Two things, your Honor. With regard to the reasonable purchaser language, and Mr. Singer had raised an

issue with regard to "involved" and that it might be too broad so we wanted to offer some alternative language.

We would say: A reasonably prudent person with the authority to participate in the decision. I'm sorry. A reasonably prudent person participating in the decision of whether.

A reasonably prudent person participating in the decision of whether to purchase or how to price the loans.

THE COURT: Yes, I like that. Reasonably -- participating in the decision of whether to purchase mortgage loans, etc. Yes.

MR. SINGER: To me that word is no different than involved. It really raises the same issue if you're participating in.

THE COURT: No. It focuses on the person who is involved in the decision, which is I think sufficient for materiality purposes.

MR. SINGER: For the record, we would prefer "responsible for." That actually focuses on --

THE COURT: In many instances there was no one person responsible for. And moreover, even if there had been, if someone who parlayed the information to him, but was meaningfully involved in the process, would, if told of the omitted information, have made a different presentation, that still would show materiality.

A lot of this is very abstract. In the context of this case we know the few people we're talking about, and both sides I'm sure will focus on that in their summations. I think the government's suggestion is fine.

MR. SINGER: Could we get around the singular plural issue by saying "persons responsible for" or something to that effect?

THE COURT: I think it now accurately states the law as applied to the facts of this case so I'm going to leave it at that. Go ahead.

MR. ARMAND: The other, your Honor, just coming back to the breach of contract, the mere breach of contract itself not being fraud. Again, we're very concerned this could give the jury the impression that the fact that the reps and warrants are not being complied with, that they'll conclude that there can be no fraud. It could be confusing to them.

However, if the Court is inclined to use this language, we would suggest including between mere and breach, including unintentional. So it would be, however, a mere unintentional breach of contract by itself is not fraud.

THE COURT: That's not really the point. Or that's only part of the point. But I see what you're driving at. Let me think about this for a minute.

How about in place of what we had before, how about at the end of the previous paragraph, and let me read the previous

paragraph because I made one other tiny non-substantive change. This begins at the bottom of page 12.

Here, specifically, the government alleges, and the defendants deny, that one or more of the defendants devised a scheme to induce Fannie Mae and/or Freddie Mac to purchase mortgage loans originated through the High-Speed Swim Lane by misrepresenting that the loans were of higher quality than they actually were.

The government further alleges that these misrepresentations were material because a reasonably prudent person participating in the decision of whether to purchase mortgage loans at Fannie Mae or Freddie Mac would have considered the true facts important in deciding whether to purchase or how to price the loans.

Then I would add the following: Incidentally, the fact that some of these alleged misrepresentations may have constituted a breach of the contracts between the bank defendants and Fannie Mae or Freddie Mac is neither here nor there; your focus should be on whether there was a scheme to defraud.

This would replace the language that we previously had later about, however, a mere breach of contract. So I'll read that new sentence once again.

Incidentally, the fact that some of these alleged misrepresentations may have constituted a breach of the

contracts between the bank defendants and -- it should be may have constituted breaches of the contracts between the bank defendants and Fannie Mae or Freddie Mac is neither here nor there; your focus should be on whether there was a scheme to defraud.

Let me ask the government, do you prefer that to the sentence previous?

MR. ARMAND: We definitely prefer this to the prior sentence, your Honor. However, we would still like to preserve our objection to having any reference to breach of contract at all.

THE COURT: Duly preserved.

MR. ARMAND: Thank you, your Honor.

MR. SINGER: Your Honor, the only additional suggestion we would have is where it says may have constituted a breach of the contracts, I think it should say may or may not have. There has been no --

THE COURT: That's why I said alleged misrepresentations and may -- between alleged and may, you don't need to add -- it's like the old grammatical point. You don't have to say "whether or not" because "whether" implies "whether or not." But you knew that.

MR. SINGER: Irregardless, your Honor.

THE COURT: All right. Very good. So I think we've reached the end on the instructions, other than the ones that

are here that anyone wants to consider adding.

This is on any and all purposes, this is your last bite at the charge. So go ahead.

MR. ARMAND: Your Honor, I do have some proposed language for the limiting instruction issue that the government raised. We would propose "evidence that I have instructed you may not be considered for purposes of determining Ms. Mairone's personal liability, may nevertheless be considered by you for purposes of imputing Ms. Mairone's intent to the bank defendants in connection with determining the bank defendants' liability."

THE COURT: Well, it's as good as one I suppose could get at that nice distinction. I'm still concerned, but let me hear from defense counsel.

MR. MUKASEY: Judge, I think it is an instruction that swallows the purpose of the limitation. What it really says is, you cannot consider it against Ms. Mairone, but you can consider it against Ms. Mairone to the extent you're applying it against the banks. And I think that requires a how many angels can dance on the head of a pin determination.

THE COURT: Actually, I would have thought, but this is an adversary system, that you would not be unhappy with that, and that the bank defendants would be unhappy, because it almost invites a way of the jury, if they feel sympathetic to Ms. Mairone --

MR. MUKASEY: I certainly hear what you are saying. I do think, however, it is extremely hard for a juror to say I can consider this limited --

THE COURT: As a practical matter, you are saying that they would have to think like lawyers, and I don't wish that upon my worst enemy. I think that's really right. And I think the government has done a pretty good job of coming up with a proposed instruction. And it accurately states the law I believe.

But, I do think it will be, as a practical matter, confusing to the jury rather than helpful because of the difficulty they will have as laypersons making that kind of distinction. Yes.

MR. ARMAND: Just one final point, your Honor. I think it does give the bank defendants a windfall here with regard to the hearsay evidence that would show Ms. Mairone's intent. That's why we're asking for this. So we are doing her --

THE COURT: That is true. That is absolutely true. Let me hear again the language one last time. I'll ask my never-failing law clerk who is perfection himself to copy it down.

MR. ARMAND: "Evidence that I have instructed you may not be considered for purposes of determining Ms. Mairone's personal liability may nevertheless be considered by you for

purposes of imputing Ms. Mairone's intent to the bank defendants in connection with determining the bank defendants' liability."

THE COURT: It's a good job. In the absence of it, they do get a windfall. But any juror reading that and hearing that is going to shake their head.

I really think that one of the reasons my instructions, which, for better or worse I'm very proud of, are so much shorter than so many jury instructions that are given these days is because I really believe that jurors, if they have instructions that they can understand and follow, will follow. That's been my experience.

It is interesting in large parts of this country, jurors are not furnished with a copy of the written instructions, jurors are not allowed to ask for testimony to be read back or sent in by way of transcript. Jurors are told, basically, in response to just about any note they send out, your recollection controls. And that's because of a view that, in reality, we don't think jurors can really deal with the niceties of the trial process. They should instead sort of just be the voice of community expressing their gut reaction to the massive instructions and evidence that they have been presented with. And I acknowledge that there are even federal courts that take that position. But it's, to me, antithetical to what the jury process is all about.

My entire endeavor through this trial and in these instructions is to make things sufficiently clear and comprehensible to the jury that they will have no difficulty in undertaking their critical role.

So with acknowledgment to the government that the point that they're making is not without considerable force, I'm still going to deny that instruction.

Anything else from the government?

MR. ARMAND: Your Honor, there were two additional instructions the government had proposed. This was request number 15 in the government's proposed charges. Negligence of the victim not a defense. This was on page 23 of our request to charge.

THE COURT: So if I put in something about that, this would come in the first paragraph of page 13. The government is not required to prove that the scheme to defraud actually succeeded, that a given defendant personally benefited from a scheme to defraud, that Fannie Mae or Freddie Mac actually suffered any loss as a result of the scheme to defraud, or that Fannie Mae or Freddie Mac were themselves free from fault.

Right? That's the gist of what you want?

MR. ARMAND: Yes, your Honor.

THE COURT: You probably gave me a whole long thing on it. You think that's the gist of it, right?

MR. ARMAND: Yes. It is just there have been some

suggestions through the questioning that Fannie and Freddie through their own due diligence could have figured out what was going on. And so, that's sort of the thrust. So, I think that would work, your Honor.

THE COURT: Let me just find out if there is any objection. So we're adding the words at the very end of that sentence "or that Fannie Mae or Freddie Mac were themselves free from fault."

MR. SINGER: Your Honor, if the concept is going to be added, I don't have a problem with the wording. But I do think the concept does not need to be added because there has been no suggestion and there will be no argument that Fannie and Freddie were at fault.

THE COURT: I think there is the danger the government refers to. So I'm going to put that in. Okay.

Your other one?

MR. ARMAND: The last one was request number 16. There is a pattern charge from Sand that deals with persons not on trial. This was on page 24 of our request to charge number 16.

THE COURT: Let me pull that out.

MR. ARMAND: I can read it if you like as well.

THE COURT: I've got it. Page 24?

MR. ARMAND: Correct, your Honor. The only change we would make to this request is just in the last paragraph where

it references the United States attorney, we would want to substitute that for the government generally. Because in a civil case --

THE COURT: I really think this one, I'm not sure I would give it in any case, but I'm certainly not going to give it in this case. I think is a red herring. This one hasn't been raised at all. There has been no claim why isn't X here, why isn't Y here, why isn't Z here.

I assume Mr. Sullivan or Mr. Mukasey, you're giving the closing argument?

MR. MUKASEY: I'm not. Mr. Hefter is.

THE COURT: Is he going to make the argument how, if they're responsible, how come Mr. Kitashima or Mr. Lumsden wasn't named? That would be an outrageous argument, and would lead me to the very unfortunate result of having to hold whoever was making that statement in contempt right in the presence of the jury. And as he was led away by the marshals, I would of course advise him of his right to counsel.

MR. MUKASEY: I would hire Rick Strassberg right away.

THE COURT: So I don't think we need this instruction.

MR. ARMAND: Very well, your Honor.

THE COURT: Bank counsel?

MR. SINGER: We have just one other charge. I am going to ask my colleague Ms. Jones to handle this one since she actually understands it.

MS. JONES: Your Honor, it can only mean one thing. Both parties have requested an instruction of the affecting prong of FIRREA that the jury, to find the defendants liable, that they have to find that the fraud affected a federally insured financial institution.

THE COURT: I'm glad you raised that. Because I'm not going to redo that, as you know. But I think, technically, I have made in the course of this charging conference two Rule 50 partial determinations. I have ruled under Rule 50 that there is no basis to go to the jury on the affect element. And I have ruled with the government's consent that there is no basis to go to the jury on what we've been calling the process issues as a basis for liability as opposed to evidence of intent. So now that I've ruled against you, what would you like to say?

MS. JONES: If I just may preserve one argument. We didn't get a chance to respond. At the Rule 50 motion Ms. Nawaday pointed to two exhibits that she thought proved or were the government's evidence that they had put forward an affect as alleged in paragraph 141 of their complaint. Those exhibits were repurchase letters and PX 322 and PX 381. The defendants argue that neither of those is an HSSL loan. So that's why we think there is an issue to go to the jury on whether the government has proven that.

THE COURT: Even assuming that were true or there was an issue about that, I would still come out the same way. The

more I've thought about this, the more it seems to me that if a bank engages in violations of the mail fraud or wire fraud statute, that as a matter of law, it affects the bank. If it is a federally insured bank, then it affects a federally insured institution.

The argument was made by the defense, among other things, that this proves too much. If the misconduct is on the part of a not insured person or entity, and it then impacts a federally insured entity, which may also be present in this very case, then the element would still be in the statute. But where it is the insured entity itself which is doing the misconduct, it as a matter of law subjects itself to the increased liability and risk.

Therefore, there are other reasons that I've already given on the record, but for that reason alone, it is no longer a matter to be presented to the jury.

I also have, though there may be case law to the contrary, I didn't look into this, I also have a little question in my mind as to whether the affect element, even if genuinely disputed in some respect, is a jury issue as opposed to a judge issue.

The determination of under what statute is a jury issue or a judge issue is often very difficult. For years, for example, materiality was thought to be a judge issue and ultimately the Supreme Court decided it was a jury issue. On

the other hand, in many commercial areas, like in the determination of claim construction under a patent, which I'm sure you're intimately familiar with, though it often involves factual disputes, has been held by the federal circuit to be an issue of law for the Court.

I don't have to reach that, because even if it were arguendo an issue for the jury in the abstract, I'm finding on the facts of this case as a matter of law it is not.

But, I do have a little question in my mind being that there may be case law on that point of whether it is a jury issue or a judge issue.

And actually, while we're at it, someone needs to educate me -- I assume there is case law on this maybe in the statute. This is a statute that at least one way or the other could be read as a statute providing equitable remedies. That's why the penalty phase is for the Court. Is it crystal clear that the liability phase is for the jury? I think I would come out that way, so I'm not going to tell the jury to go home at this point. But, I wonder if that's so crystal clear.

Anyway, I don't know if you want to comment on any of those ramblings.

MS. JONES: They're all very interesting, your Honor. We understand your ruling.

THE COURT: But the application is denied.

MS. JONES: Thank you.

MR. ARMAND: Your Honor, if I can just make one point in response. There is more evidence in the record concerning affect than the two exhibits that were just referenced.

THE COURT: You're not limited -- in my view on virtually any view of the standard, there is no way a reasonable juror could have a genuine dispute over the affect issue. So, you're entitled to summary judgment, you're entitled to Rule 50, you're entitled to whatever you want to call it. It is not for the jury in this case.

MR. ARMAND: I understand. The only point I wanted to make for the record is Plaintiff's Exhibit 308 contains evidence of specific repurchases that were made by BANA, and repurchase demands that were sent both to Countrywide Bank and to BANA, and those are constitute additional evidence of affect on those two institutions.

THE COURT: All right. Anything further from Ms. Mairone's counsel?

MR. MUKASEY: No. Not until we get to the verdict sheet, Judge.

THE COURT: Okay. So let's go to the verdict sheet.

MR. MUKASEY: Just a little typo.

THE COURT: Yes.

MR. MUKASEY: On the government's claim against Rebecca Mairone, there is an extra the. We the jury find the

Rebecca Mairone. If you can just strike that. So part of our theme here is that she's an individual.

THE COURT: You don't understand. It is The Rebecca Mairone, as opposed to all those other ones out there.

MR. MUKASEY: Judge, after your Honor takes comments on the rest of the verdict sheet, I am going to try to persuade your Honor to reconsider the rebuttal issue.

THE COURT: Okay. Any other comments on the verdict sheet? Thank you for catching that typo. Anything from the government?

MR. ARMAND: No, your Honor.

THE COURT: Anything from bank defendant?

MR. SINGER: No, your Honor.

THE COURT: Very good. Before we turn to your issue, Mr. Mukasey, I just want to find out where do we stand on the indices?

MS. MAINIGI: I think we're ready to go, your Honor. We have our exhibits ready and the indices ready, and in fact we were hoping we could just leave them here tonight.

THE COURT: Sure, you can. In fact, what is in that cart over there?

MR. ARMAND: This one? It is our cart, but nothing that can't be removed.

THE COURT: Okay. If you don't mind, why don't we just leave the cart here or do you need it to take stuff back?

MR. ARMAND: Not necessarily. We're happy to leave it here.

THE COURT: Before you leave today, just put your stuff in there and the government can put theirs in tomorrow.

MR. ARMAND: We may be ready to do it today.

THE COURT: That's fine. Have you exchanged your indices?

MR. ARMAND: Yes.

MS. MAINIGI: Yes.

THE COURT: Terrific.

MS. MAINIGI: Your Honor, I can go after Mr. Mukasey. I don't know whether you want to view it with jury instructions or separately as part of limitations on closings, but the issue is the self-reporting issue. And our view that there is a complete absence of evidence to proceed on that issue. And that to allow the government --

THE COURT: We'll hold that thought.

MS. MAINIGI: Yes.

THE COURT: Mr. Mukasey.

MR. MUKASEY: I am going to go to the podium because it seems to add a level of gravitas to the argument. Judge, knowing --

THE COURT: I take it this is why your pocket handkerchief today is --

MR. MUKASEY: White.

THE COURT: And formal because it adds to the weight of the argument.

MR. MUKASEY: That's exactly right.

Your Honor recognized on Friday that this is one of the closer cases that the Court has seen in a while. And I agree with that, at least from my perspective. Your Honor also recognized that it is within your broad discretion, unquestionably, to permit the order of closing arguments in any manner that the Court deems fair and helps the jury to understand the case best.

We did a real survey of almost every circuit over the weekend, and I can't say honestly that we found anything that calls into question anything your Honor said about that. One thing we did find, however, is that all circuits and many district courts found the power of the rebuttal to be extraordinary. And that normally comes up, as I'm sure your Honor has experienced, when the government is giving rebuttal summation in a criminal case and all of a sudden some divine inspiration comes down on the prosecutor and he makes an argument that is really over the line. And that often will cause either a rebuke from the judge or the circuit or a reversal.

My only point there is that the power of the rebuttal being the last voice the jury hears is extraordinary. And I believe it is understandable and necessary that in the case

where the burden is beyond a reasonable doubt, especially in a complex case, that the government ought to get that last word.

But, in a case where an extra feather or two on the scale can tip the balance, such as this one, the rebuttal seems to have outsized and disproportionate strength. It is somewhat of a nuclear device in a case where you only have to prove it by a preponderance.

I don't suggest that the government doesn't have a burden to carry. They have a burden to carry. But carrying that burden with the extra weapon in their back pocket of being the last voice that the jury hears, and being able to have the last word, really seems, and again, I don't have authority for this, although I am going to cite something in a minute. But it does seem to be a disproportionate advantage in a case where the burden is by a preponderance.

Your Honor, the only authority that I could find to quote to the Court is your Honor's own rules. Which clearly state that in civil trials, plaintiff's counsel will sum up first followed by defendant's counsel. No rebuttal will be allowed unless defense counsel makes an argument that plaintiff's counsel could not reasonably have anticipated and dealt with in summation. That's rule number 11.

Obviously your Honor is free to disregard your own rules. And I'm not even going to stand here and say we relied on that in preparing the case or anything. But, given the fact

that this is the norm in your case, it is the norm in other civil cases, even civil cases brought by the U.S. attorney's office, and given the fact that the rebuttal has been recognized by every circuit as a wildly powerful tool, we would ask your Honor to reconsider the ruling that the government ought to be able to have a rebuttal in this case.

THE COURT: Well, thank you for that eloquent presentation, and I'm glad you picked up your handkerchief and I hope you won't hesitate to use it if I rule against you.

MR. MUKASEY: Or wave it as a white flag.

THE COURT: This is not a football game. Or a baseball game. Although you notice that the Dodgers in their losing effort had their fans waving blue handkerchiefs. That really goes beyond the pale.

To get serious, one of the most surprising discoveries for me when I've talked to juries after trials since becoming a judge, and either I or my law clerks talk to the jury after every case, and my main question to them is always about my instructions, whether they're clear and so forth. But is how little the order of witnesses, order of summations, things like that, have upon the outcome of the case.

Your assertion, which is certainly to be found in much of the case law, that rebuttals, last person to be heard, has an unusual weight, is in fact not borne out by what jurors have told me, and for what it's worth, not borne out by the

sociological studies that have been done by criminologists and sociologists looking into jury verdicts.

Now, I'm not sure that those studies are very reliable, because they tend to rely on mock juries, and a mock jury is never really the same as a real jury. For example, those studies tend to say that one of the most important things in the outcome of the case are opening statements. In which case, you've had an incredible advantage because yours was the last opening. And the government has in vain tried to overcome that meteor, that atomic bomb, that nuclear advantage that you obtained through having the last opening statement. But I'm not sure there is anything much to those studies.

My point is, the assumption that a number of courts have made in the opinions that you're referring to is I think a speculation at best. Not borne out, at least in my experience, either by the sociological studies or to my conversations with jurors.

One of the reasons for that is that the last thing the jurors hear is not the lawyers at all. It is the Court giving them instructions of law, which they know is the most important thing that they have to pay attention to before their deliberations.

If I had a misgiving about any of the innumerable different approaches taken in all the courts in the United States on this kind of issue, it is to those courts, for

example, in the State of Oregon, where the judge is required to give the instructions of law before the summations. The theory being that that will help the jurors to understand the summations better. But then, it is really truly one party or the other that is the last that's heard by the jury, and that's not true where the judge gives the instructions last.

There is also the aspect in this case that the government's rebuttal will be at the very end of a very full day of summations. And an argument could well be made that at 4:30 in the afternoon, having heard summations all day long, the impact of a 20-minute rebuttal will be considerably reduced.

And finally, it was because I thought there was maybe something to the point you were making, which I intuited in advance, that I cut them down to 20 minutes. That will mean that they won't be able to respond to lots and lots of stuff that will be in everyone's summations. They will have to pick and choose what they consider to be the most critical points to respond to. And I think given the burden of proof, that's only fair.

So, your point is not frivolous. But I adhere to my original decision.

Now, that reminds me that in order that all the summations be completed tomorrow, we need to start promptly at 9:30. I'm glad I'm telling you folks that. But, I will be

here at 9:30.

MS. MAINIGI: Us too, your Honor.

MR. MUKASEY: Judge, could I ask a quick question. You had mentioned, and we may want to burn this bridge when we get to it. You had mentioned you were not around on Friday. Were we going to discuss a procedure for Friday.

THE COURT: Let's get to that in a second. Let me just map out tomorrow.

So, the government has two hours and 10 minutes for its opening summation. Normally, we would take a break as we usually do around 11, 11:15. I'm more inclined to let you go through your entire summation, but if you would prefer to take the midmorning break say an hour and a half into your summation, I will accommodate that. So let me know that by tomorrow morning.

MR. ARMAND: Will do, your Honor.

THE COURT: Assuming you want to go through it, we will then take the break immediately after your summation. But I'm going to hold these breaks much more strictly than previously to 15 minutes.

So, let's say we start at 9:35. Two hours and 10 minutes would take us to 11:45. We would then have a 15 minute break. And then we will split the bank defendants' summation into two halves, so there it will be an hour before lunch, an hour after lunch. At 3 o'clock I think the only thing fair

thing -- you tell me, Mr. Mukasey. You want to go straight without a break into your summation or do you want a 10 minute break?

MR. MUKASEY: I think a 10 minute break would be great.

THE COURT: We'll take a 10 minute break. That will take us to 3:10. You would then go to 4:10. We would then take another 10 minute break. And 4:20, and we'd hear the government's closing arguments until 4:40.

I'm inclined to think that if everyone takes their full amount of time, we will do my charge to the jury first thing Wednesday morning. If things move faster, because people don't use their full time, then we will have our charge to the jury at the end of the afternoon.

I promised the jury we will always break at five or earlier, never go beyond five, so I want to be true to that. And in addition I'm supposed to give a speech at the Bar Association at six. So, I wouldn't want to go past five in any event.

Now the question comes up then whether we should tell the jury when I excuse them to start deliberating at the very end of tomorrow afternoon or very early on Wednesday morning, that we're not sitting on Friday, if we're not sitting. Or that we are sitting but that the verdict cannot be returned on Friday. I think those are the two options. I could handle

notes by phone, but not a verdict.

MS. MAINIGI: I think, your Honor, our preference would be to simply wait and see what happens, as your Honor originally suggested.

THE COURT: I think the trouble with telling them in advance is that it puts pressure on them.

MR. MUKASEY: I'm not advocating. I just wanted to know for our purposes.

THE COURT: On the other hand, I'm not real keen about doing notes by phone. Although I have done it in the past, it can be done. I agree with you what you've just said. We'll just play it by ear and we'll see where we are midday Thursday.

MR. ARMAND: Government agrees to that as well.

THE COURT: Very good. Anything else we need to take up this afternoon?

MS. MAINIGI: Self-reporting, your Honor.

THE COURT: Yes.

MS. MAINIGI: If I could be heard on that briefly. The issue here is the same as the issue I think that your Honor reached on affects as well.

THE COURT: I'm sorry. We do have a whole other area to take up and self-reporting is a part of it, which is ground rules for summation. And there are some folks who have been waiting here for a 3:30 matter that will take about 20 minutes. Unless you all think we can deal with all the summation issues

in 10 or 15 minutes, I would take that matter and then go back to you. But if you think we can, I'll finish it now. Do you all think we can?

MS. MAINIGI: I'll be very brief, your Honor.

Your Honor, the self-reporting issue came up obviously in opening statements. I think since that time, it has been a theory in search of some facts. In short, we don't believe that there are any facts in evidence that really give any support to that area in particular, as it relates to the intent element that would be needed. There is no one that has testified as to -- no one has even been identified as to who the self-reporting person is. Did they know about the High-Speed Swim Lane? Did they do anything about the self-reporting vis-a-vis Fannie and Freddie? Did they know about the requirement, did they intentionally not self-report? Then we have this whole issue of the SUSs and --

THE COURT: Now that the process part is out, not of the case since it still bears on intent, but out of the case as a separate theory of liability, I am not sure how this comes up. If they represented that the loans were investment quality, and the evidence shows that they're not investment quality, or that that was misleading, given what they really were, it is not a question of self-reporting, right? It is a question of a misstatement.

MS. MAINIGI: Well, I would agree with you, your

Honor. That's why in order to avoid the confusing the jury tomorrow, I don't think that the government should launch any sort of separate argument in their closing statement relating to self-reporting.

THE COURT: Let's hear what they plan to say. That's why we want to save it for the summation. Who is giving the government's summation?

MR. ARMAND: Ms. Nawaday.

THE COURT: And rebuttal as well?

MR. ARMAND: No. Mr. Cordaro is doing the rebuttal.

THE COURT: I must say this has got to be the full employment case of the century. Anyway, go ahead.

MR. ARMAND: The reporting issue, the self-reporting issue goes to the duty to correct misrepresentations. They were selling loans as quality loans they knew were bad loans. As a result, the contracts specifically provide that they have to report these.

But separate and apart from that contractual duty, as a matter of law they had a duty to correct material misrepresentations that they made to Fannie and Freddie. So the fact that they only self-reported six of the loans is certainly relevant.

THE COURT: So let me go back to defense counsel. What they're calling self-reporting is maybe a terminology debate. If you make a statement that is a half truth, a

classic half truth, and you fail to give the other half, and it creates a misleading impression. Then as I've already charged the jury in my draft charge, you have liability.

So, now, it may be relevant in terms of intent that someone knew, if they did know, I can't remember what the evidence is in that regard. That they had a duty to self-report or something like that.

But, putting that aside for the second, what the government is saying is, they misrepresented X, they arguably corrected it in some respects in a few cases, but that's not enough to escape liability because they didn't correct it in all the other cases. So, it was a false or misleading statement.

Why isn't that just the basic law?

(Continued on next page)

MS. MAINIGI: Your Honor, it certainly could state a theory, but our point is the stuff that we're leaving aside is the stuff that matters. There's no evidence in the record to support it. What they have put into the record are several folks from the GSEs essentially reading out the self reporting provision then Mr. Battany who says with respect to SUSs, as your Honor said the other day, he essentially testified that an SUS on the corporate QC results might be something that is reported or might not be something that is reported depending on whether that particular loan or material defect violated Fannie's guidelines as opposed to Countrywide's guidelines. And there's been no effort made here to tie any particular SUS to a violation of Fannie's guidelines such that one could create even an inference of self reporting.

Furthermore, we don't even have evidence in the record to who is responsible for this self reporting. Did that person know about the High-Speed Swim Lane? Did they know about any of the loans going through the High-Speed Swim Lane? Did they have conversations with Rebecca Mairone, Cliff Kitashima and Greg Lumsden?

THE COURT: Maybe this all turns on terminology. If the argument were made by the government on summation, you heard how the defendants told Fannie Mae and Freddie Mac X, they knew that was only half the story, or they may say they knew it was untrue but I'm dealing with the half truth

situation, they knew it was only half the story and they never told them the other half that would have been necessary to make the representations true and accurate and not misleading. There can be no objection to that argument. That would be a classic argument for a misleading misrepresentation.

Now I take it what you're objecting to is not that. If you're objecting to what I just said then we have a problem, but assuming --

MS. MAINIGI: I'm not objecting to the theory.

THE COURT: You're objecting that they're going further and saying and not only did they conceal the other half of the truth, but they did so knowing they had a duty to report the other half because here it is on the self reporting thing. So that is an argument they could only make if there is evidence of knowledge of that self reporting. It really goes to intent. And so if there is such evidence, I think they could make that argument. If not, I think they can't.

MS. MAINIGI: And we endeavored to pull from the evidence, the transcripts evidence that relates to the self-reporting issue, and we're happy to have your Honor consider it at your convenience this evening, but we absolutely agree that is the issue as defined.

THE COURT: Hand it up.

MR. ARMAND: Could I speak, your Honor? So we'll take a look and to the extent -- if there are additional citations

we'll provide them to you as well, your Honor. But regardless, to the extent government wants to show that the folks who knew that the loans were bad were sold with misrepresentations, I just want to make sure we can still --

THE COURT: And they never took steps to apprise Fannie Mae or Freddie Mac or make sure that Fannie Mae or Freddie Mac were apprised of this, I can hear all the arguments purposely because they knew it was blah, blah, blah. Sure, that argument is not a problem, it's only with respect to this more particularized, quote, duty to self report. If they didn't know about it, then it doesn't bear on their intent.

MR. ARMAND: OK. But at least -- I understand your Honor, but with respect to the fact of the six loans being -- that those are the only Hustle loans that were reported, what I want to make sure that fact is still something that can be presented in connection with their intent, not knowledge of the duty to disclose, but in terms of correcting their own knowledge of the misrepresentations.

THE COURT: Yeah. In other words, because that's in effect something that because of the very strict limitations on rebuttal time you need to put up front, because it's anticipating an argument that fairly could be made by the other side, the thing that everything was disclosed, everything that needed to be disclosed was disclosed.

MS. MAINIGI: Your Honor, with respect to that issue,

we would obviously oppose the government being able to reference the six loans that were allegedly self reported because that is in essence the issue. What they said in their opening is there was a duty to self report and they reported only six loans, the inference being that we are going to show you evidence at trial that demonstrates that they had a duty and knowledge and intent to disclose more. They didn't demonstrate that, your Honor.

THE COURT: But this is why I know you folks are so focused on this that I think you missed the woods for the trees. If there were no duty to self report whatsoever, the fact that a misrepresentation was made and the facts that would correct the misrepresentation were not conveyed, that would arise as a matter of law. As a matter of law, you can't tell -- it is no defense, it is no defense in a fraud case that what you did tell was the truth if it create as a false impression and you fail to give the other half of the truth. That's the most fundamental law of the law of misleading as opposed to affirmatively false representation. That's what that law is all about.

There are three possibilities in fraud. This is the law since at least Lord Mansfield, who I'm sure you remember, but in case you didn't, the great common law judge of the latter part of the 18th century. If you tell a lie, you're liable in fraud, putting aside all the limitations like

materiality and so forth. If you are silent, the fact that you know some other facts is neither here nor there unless you have a fiduciary or similar duty to report. So silence ordinarily is not. Then we come to the mid case, the mid case is the half truth where what you say is true but it creates a misleading impression to a reasonable person, then you are obligated to give the other half. And if you fail to do so, you committed the act of fraud. And then, of course, the question then becomes did you do so intentionally, in which case the burden is on the plaintiff to show that you held back that other half intentionally. So that's the law of misleading as opposed to a flat-out false statement, they're true but only a half truth.

So to the extent the government is saying what was revealed to the banks was true but only the half truth, then it's highly relevant that the other half was concealed. If the other half was revealed in six cases, the government of course has to bring that out so it's not open to the argument: What are you talking about, there were these six cases where we revealed the truth. If there's a duty to self report, that becomes relevant, however -- by that I mean a contractual duty as opposed to the overall legal duty I just explained. If there's a contractual duty to self report that would only be pertinent if the person had knowledge of that duty.

So the argument would be they knew they were only giving half the truth when they committed fraud and the fact

that in six cases they let the truth slip out, ladies and gentlemen, the fact they let it slip out in the other cases but it's worse is the kind of argument, assuming they have the evidence, they knew they had a contractual duty to self report, they knew that they -- it wasn't even a question of the overall law, it's a question of the specific knowledge and they failed to do that. And why did they fail to do it? Because they wanted to defraud, blah, blah, blah. If they didn't have that knowledge, I don't see how the self reporting requirement comes in.

MS. MAINIGI: I agree that they don't have that knowledge, your Honor, but I don't necessarily agree that this is a half truth situation. This is an omission situation. Why in the world --

THE COURT: No, the representation broadly stated is these loans are of investment quality, and as every witness has testified, that's not a self defining term. And there are a lot of aspects to it, so some were revealed and some were not revealed.

MS. MAINIGI: But I think with respect to whether there was any obligation to reveal any of the High-Speed Swim Lane loans because they did not match up with the Fannie guidelines such that there was an affirmative obligation to report that, there's a complete absence of proof on that, your Honor. There's an absence of proof in terms of identifying

those particular loans and then an absence of proof in terms of identifying particular people at Countrywide who would actually have knowledge and intent.

THE COURT: All of this makes me think that we're never going to finish this discussion in 15 minutes. So with apologies, I'm going to take a break, I'm going to take another matter, and we will resume in approximately 20 minutes or so.

(Recess taken)

THE COURT: So let me hear some more self reporting from defense counsel.

MS. MAINIGI: Your Honor, if your Honor is willing to consider it, we might be able to solve this issue with a sentence in the jury instructions on self reporting. We drafted something during the break, and it could come right after the breach of contract language, that you add: You may not find that any defendant is liable on the basis of any alleged failure by the defendants to self report HSSL loans to Fannie Mae or Freddie Mac.

THE COURT: No. I thank you for your good try, I think that creates more problems than it solves.

But let me go back to the charging conference. Let me hear exactly or as close to exactly as the government can say as to what it plans to say on the subject of the contractual self reporting obligation. I repeat what I said previously that there is, as a matter of law, a liability that attaches

when you only tell half the truth. But that's not what we're talking about here, we're talking about arguments concerning a specific contractual duty to self report.

And remind me, where is that in that same exhibit we were looking at earlier, PX2?

MS. MAINIGI: Your Honor, I attached the provisions to the book I provided you, the book the Fannie and Freddie provisions.

THE COURT: Thank you very much. So the first one, which is paragraph or Section 48.9 --

MS. MAINIGI: That's Freddie Mac, your Honor.

THE COURT: That's Freddie Mac. The seller's quality control program must provide that all quality control activities be fully documented in writing and reviewed by management on a regular basis. The results of quality control reviews must be reported in writing to the seller's senior management within 90 days of selection of the mortgage files for review. The seller must thoroughly analyze findings affecting the acceptability or eligibility of mortgages and initiate any corrective actions. A seller must notify Freddie Mac (see Directory 2) in writing within 30 days of the seller's determination that a quality control finding affects the eligibility of a mortgage sold to Freddie Mac. Freddie Mac reserves the right to increase the sampling or to impose other requirements on a case-by-case basis.

Then there's a page here that doesn't have a heading, so I don't know where it's coming from.

MS. MAINIGI: That the two pages, your Honor?

THE COURT: Yes.

MS. MAINIGI: That's the Fannie Mae language.

THE COURT: So this is for Fannie Mae, quote: We expect a lender to advise its lead Fannie Mae regional office immediately if it learns of any misrepresentation of breach of a selling warranty. This notification is required for all breaches or misrepresentations, including fraud in the origination and underwriting processes, regardless of whether the act is committed by the lender and the lender's agent, the borrower, or any other third party, and whether or not the lender believes that the fraud or misrepresentation constitutes a breach of its representations and warranties. And there's a similar language on the second page of what you handed me.

So putting aside the legal implications under the doctrine of fraud as to failure to make disclosures necessary to make what has been represented true and accurate in the circumstances, we have here a contractual duty. And the question is: What does the government want to say about the contractual duty that bears on any of the elements of the fraud claim?

MR. ARMAND: Your Honor, I think first and foremost, regardless of what is in the contract we do argue that there is

a duty to correct the false or misleading statements that were made about the quality of the loans that were being sold to Fannie and Freddie, and that --

THE COURT: But that's a little artificial to speak of it as a duty. It really comes down to, if we're talking independent of a contractual duty, we're talking about if you intentionally tell someone that is true as far as it goes but creates a false impression, then, unless you tell them what is missing, you committed fraud. So I have no problem with your saying it's kind of a duty, but it really comes back -- the gravamen of the crime is the telling of the misleading half truth.

MR. ARMAND: Correct.

THE COURT: And as with all frauds, of course, if you correct it before it's too late, you may get yourself off the hook. So if you told an outright lie, I represent to you, Mr. Inhabitant of Bangladesh, that the Yankees have won the World Series and you better put your -- get your bet in before the world learns of this, then you call them up two minutes later and say: Just a joke, looks like the Red Sox are going to win the World Series, my gosh, what has the world come to, you're off the hook, if you did it quickly enough under all the facts and circumstances before you took any action or whatever. So it's the same with half truths. It's not so much as to say you're not wrong to talk about it as a duty, but the reality is

can't tell misleading half truths. That's the bottom line.

Now you want to say something though that goes beyond that about --

MR. ARMAND: The contractual responsibilities.

THE COURT: The contractual duty as having relevance to their assessment of one or more elements of the fraud claim. What is it you want to say about contractual?

MR. ARMAND: I think there is circumstantial evidence from which the jury could conclude that Ms. Mairone and Mr. Kitashima and Mr. Lumsden were aware of the duty to disclose, less so with Mr. Lumsden because he wasn't here to testify. But specifically with regard to Ms. Mairone and Mr. Kitashima, they were aware that the loans that they were selling were subject to the contracts, to the guidelines, and that should be enough for the jury to conclude that they were aware of the specific requirement about the duty to disclose if one of the loans was not of quality.

THE COURT: If I understand what you're saying, this is the argument I was hypothesizing earlier. It goes to intent. The argument would be once they learned about the real quality of these loans and what their process had made of the real quality of these loans, they knew that what had been represented to Fannie Mae and Freddie Mac was not true but they took no steps to correct it. You can infer they did that intentionally and with an intent to defraud, and if you have

any doubt about it, it's corroborated by the fact that they knew that they had a specific contractual requirement to report and they didn't do that.

Now we're not talking, ladies and gentlemen, about breach of contract, but we're saying to you -- this is the argument -- that any doubt you have about whether they were acting intentionally in failing to correct what they now knew was a material misrepresentation should be cast aside when you realize that they knew they had a contractual duty to correct this and they didn't even follow up on that.

That's the kind of argument I take it you want to make. Yes?

MR. ARMAND: Yes, your Honor. And in particular with Mr. Kitashima, he said he understood that he was not permitted to sell loans that weren't investment quality to the GSEs. So he certainly should have taken steps to remedy the fact that he was aware that at that time they were in fact selling loans that were not investment quality.

THE COURT: So your adversary says that there's no evidence that any of the three people we're concerned with here knew about this self-reporting provision. I know you said generally they were asked about their familiarity with representations and warranties in the abstract or in the global sense, is there any -- were they ever asked about did they recognize they had a duty to report in these circumstances?

MR. ARMAND: I don't think any of them were asked specifically about whether or not they knew that the duty to self report.

THE COURT: What would be the basis on which a jury could infer that they knew about this provision?

MR. ARMAND: Because they were aware that the representations and warranties would apply, that they needed to be sold pursuant to the guidelines, that they -- this program was specifically designed to sell loans to the GSEs and that these provisions exist. So there isn't specific evidence that they were shown the provisions and did you know about this, but the fact that they knew these guidelines applied.

THE COURT: You could -- the burden, of course, is on the government. You could have asked them, regardless of whether you had seen this particular wording, did you understand if there were problems in the representations that have been made that were discovered that you had a duty to report them. But you didn't ask that apparently. So now there are a whole host of representations and warranties and contractual provisions, and how can a reasonable juror infer that any of these folks specifically knew about the self reporting?

MR. ARMAND: Your Honor, there is not direct evidence that they -- that was elicited during the trial that they knew about these provisions, and the jury would need to infer based

on --

THE COURT: I understand circumstantially, but the difference between circumstantial inference, which is permissible, and something that is just gross speculation is the line we need to draw.

MR. ARMAND: It's kind of a fundamental aspect of the relationship. If you are selling loans that you are representing are investment quality, it's a basic assumption that you're going to need -- you have specific knowledge that loans that you're selling are actually not investment quality and that the representations that should be made are false or misleading.

THE COURT: You're missing my point. There's nothing that is going to prevent you from saying they misrepresented loan quality and they never took the slightest step to correct that misimpression, and we ask you to infer they did that because they had an intent to defraud. That argument is absolutely permissible.

It's the furtherer argument you want to make, which is that this inference is further corroborated by their breach of the self reporting requirement because it shows they had a heightened knowledge, if you will, of the need to bring this to the purchaser's attention and failed to do that. And what your adversary has handed up, you have lots and lots of witnesses who talk about from the other side how the contract creates a

self-reporting requirement, but I don't see anything from the Countrywide side. I'm looking at this very quickly, so I may be missing --

MS. MAINIGI: No, your Honor, there's nothing there. With respect to Mr. Kitashima's testimony as I recall it, generally, I believe I asked him as to whether he had any awareness of the reps and warrants process with Fannie or Freddie, and he indicated that he did not because he was not involved with the sale of loans to Fannie and Freddie.

THE COURT: And what about Ms. Mairone?

MR. MUKASEY: We found some testimony, Judge, that says simply that she was aware that loans were sold to Fannie and Freddie with the representation that they were of investment quality, nothing more particular than that.

THE COURT: That establishes the first part of it but not the second.

MS. MAINIGI: Here's the exact Q and A.

"Q. Mr. Kitashima, in your role as chief credit and compliance officer for FSL, did you have interaction with Fannie or Freddie?

"A. Not on a normal basis, no.

"Q. Did you have any involvement in the sale of loans to Fannie or Freddie?

"A. No.

"Q. Did you have any involvement in the rep and warrant

process related to Fannie or Freddie?

"A. No."

MR. MUKASEY: To further complete the record, at page 2625 of the transcript, similarly Ms. Mairone, who had noted previously I believe that she had no contact at all with Fannie or Freddie, she was aware loans were sold to Fannie and Freddie with reps and warranties but nothing beyond that.

THE COURT: The lack of contact is not dispositive.

MR. MUKASEY: I understand that, I am adding that for context.

THE COURT: For the moment, I am not going to allow that argument by the government because it lacks the factual predicate in the testimony. However, when the government is preparing its summation tonight, if it finds testimony that it believes provide more of a predicate than I have heard so far, I will reconsider that ruling, in which case counsel, because you obviously need to know this before tomorrow morning, counsel, for that purpose only, should call chambers jointly no later than 8 o'clock, and I'll hear you on that if there is such testimony.

Now in terms --

MS. MAINIGI: I apologize, your Honor, no later than 8 o'clock tonight?

THE COURT: Yes, 8 o'clock tonight, because Mr. Sullivan is probably in bed by 9. If he's absent, I'm

going to take my shots while I can.

I have already indicated that no defense counsel can make any sort of argument along the lines of why wasn't so-and-so named, why wasn't Mr. Lumsden named and Mr. Kitashima named and so forth.

Also no defense counsel -- I already highlighted this previous on days -- can make a general argument about the honesty and credibility of Countrywide people across the board. That doesn't preclude arguments about the people in this case dealing with the Hustle loan. It's perfectly appropriate to say, "As you heard, Ms. Mairone was totally truthful and candid with everyone she dealt with in the Hustle loan program," but nothing beyond that.

(Continued on next page)

THE COURT: Now, the other areas I want to give some general instructions about closing arguments, but anything else any counsel wanted to raise?

MR. ARMAND: A handful, your Honor. In addition, during the opening, there was some references from the defense for the bank defendants about the relationship between Countrywide and the GSEs being a close relationship and that the GSEs were experts. And I guess really two things. One goes to what the jury instructions that we just requested that they should have been able to figure this out on their own based on their close relationship and their due diligence. And the second thing is any suggestion that there was some general honest and fair dealing between the Countrywide and the GSEs, that would open the door to the Ms. Simantel issue.

THE COURT: I agree with all that. Anything else?

MR. ARMAND: Yes, your Honor. In addition, there was some references to Bank of America not having done anything wrong in connection with this case. And the only thing -- that's true. We're not alleging that Bank of America did anything wrong.

To the extent all the bank defendants are being lumped together, we don't want a juror to say, if we have to treat them all the same and it is agreed that the Bank of America didn't do anything wrong, then no one did anything wrong.

THE COURT: I agree with that. I have no problem,

however, with any counsel repeating verbatim what is in my instructions. So if counsel wants to say Bank of America as successor in liability -- the language along the lines of the instruction, just so that the jury is clear on the relations between the banking defendants, that's fine.

But the vice in what you're referring to is the implicit suggestion that because Bank of America didn't do anything wrong, there shouldn't be any liability here. Which is not going to be permitted.

MR. ARMAND: Understood. Thank you, your Honor.

Another issue was just there were statements during Ms. Mairone's counsel's opening about Ms. Mairone not having originated the scheme to defraud. She didn't create it, she came after the idea was already out there within Full Spectrum Lending. And this was an issue I had requested an instruction on. I've actually found the specific provision. It is actually from Sand, the pattern jury instructions. The government is not required to prove that the defendant personally originated the scheme to defraud.

THE COURT: That's different from what you were arguing. You were arguing that no one with intent has to originate this scheme to defraud. That it is just a free-floating scheme to defraud that came out of the miasma and then someone joined into it.

You can't have a scheme to defraud without someone

with fraudulent intent putting it together. That doesn't mean that someone can't take advantage of circumstances that are there and lead them into a scheme to defraud. And it certainly doesn't mean that the defendant you are considering has to be the person who first concocted the scheme to defraud. But, it is not a scheme to defraud unless someone concocted it as a scheme to defraud.

MR. ARMAND: That's fair, your Honor. Understood.

Then I think what we would request is that we would have just an instruction that would be limited to Ms. Mairone, and so that it is not necessary that the government prove that Ms. Mairone originated the scheme.

THE COURT: The general thing is, I think that's already implicit in the instructions. Because the instructions say there first has to be a scheme to defraud, and then the defendant you are considering has to join it, has to participate in it. No suggestion that that person was the originator. And you can certainly say that. You just can't say it the way you said it earlier, which was that it can be a scheme to defraud that no one concocted.

MR. ARMAND: Understood, your Honor.

Just another issue is just to the extent there are -- the government is a little concerned that there are going to be repeated references to the mail and wire fraud statutes being criminal statutes and it is --

THE COURT: I don't see why there should be any references to that.

MR. ARMAND: Actually, we agree, your Honor.

THE COURT: I thought you might. Let me hear if anyone is planning to make those references.

MR. SINGER: Well, I think we were until the charging conference.

THE COURT: Now you know better.

MR. SINGER: Your Honor pretty much told us we can't.

THE COURT: Yes. You cannot.

MR. SINGER: Can I ask for some clarification on the first limitation that Mr. Armand mentioned. I understand that we're not allowed to say that Fannie and Freddie should have figured this out for themselves and were negligent in not doing so. I think that's what the instruction says.

But, it may be relevant to the defendants' intent. I don't know what Mr. Sullivan is exactly planning to say about this, if anything. It may be relevant to the defendants' intent that they understood that Fannie and Freddie were sophisticated in matters of loans.

THE COURT: Obviously, since he's not here, I can't address this totally. But, if the argument is, it is not that they were intending to defraud. They didn't feel any need to disclose these material undisclosed facts necessary to give Fannie Mae and Freddie Mac the truth because they knew they

were dealing with sophisticated institutions who somehow would stumble upon the truth anyway.

If that's the argument you want to make, it's not going to be allowed.

MR. SINGER: No. I certainly don't think that's the argument we want to make. The argument might be -- and again, I'm hypothesizing -- but I think it would be fair to say that any time you are saying anything to anyone, context matters. If you understand that the person you're talking to already knows a lot about loans, for example, it is not an omission, a material omission to say, hey, by the way, these loans were originated from borrowers. So, there are certain things that the person speaking may have a reasonable understanding of the person listening knows and understands. If two sophisticated people are talking, that can be considered in terms of someone's intent to deceive.

THE COURT: I would only have allowed that if, and even then I would have some questions, but I would only allow it if Ms. Mairone or Mr. Kitashima, because we didn't hear from the third guy, said in their testimony in this case, well, the reason I didn't tell or cause Fannie Mae or cause Countrywide to tell Fannie Mae or Freddie Mac X or Y or Z was because I believed they already knew that. I don't recall any testimony like that.

MR. SINGER: No. Because those people didn't speak to

Fannie and Freddie.

THE COURT: No. But also because you never asked them, you collectively never asked them, did you assume that Fannie or Freddie already knew X or Y or Z.

MR. SINGER: There was testimony, however, on the other side of the equation from the Fannie and Freddie witnesses that they understood that loan processors, for example, cleared loans to close. So, the understanding in the industry, it seems to me, is relevant.

THE COURT: If there is a specific argument along these lines that the two absent speechifiers want to raise with me, they can do so at 8 o'clock tonight. But, nothing I've heard so far supports an argument along those lines.

MR. ARMAND: In addition, your Honor, I think this is in the same vein. The argument that the GSEs expected that a certain percentage of loans would default and their remedy under the contract would be a repurchase request. There were multiple times during the trial when this type of questioning was -- attempts to elicit this information, and the Court sustained objections from the government. So we would request that arguments along those lines would not be allowed either.

THE COURT: Yes, I agree.

MS. MAINIGI: Your Honor, we would certainly -- there's obviously objections that were sustained and that evidence is not admissible. But to the extent the Court

allowed in testimony as to any particular topic, that would be fair game.

THE COURT: That goes only so far. Because we have clarified through the jury instructions certain things. So for example, the government has lots of evidence about the process that it's now going to be able to refer to only in limited respects as going to intent, because you convinced me that we should not make that a separate claim. Now, so the mere fact that something is in evidence doesn't mean that if something has now been precluded by the charging conference that you can override those rulings.

MS. MAINIGI: I understand. Just as a general matter.

THE COURT: Yes. I agree with you as a general matter.

So, but in this issue we're just discussing, it better be brought up before 8 o'clock if there is an argument someone wants to make about that a certain percentage of the loans are going to default anyway, I don't see how that is consistent with the Court's charge. But I'll hear whatever anyone wants to say about it.

MR. ARMAND: Very last one. There were references in the opening from Ms. Mairone's counsel that suggested it was a blame the new girl, sort of a suggestion that Ms. Mairone was being singled out because of her gender, either by government witnesses or by the government in this case. And just want to

make sure --

THE COURT: I don't recall the gender, but I do recall the new person in town or something like that.

MR. MUKASEY: I think it was new girl on the block or something. But we argued --

THE COURT: I do think the use of the term "girl" was quite sexist.

MR. MUKASEY: I cleared it with the client before I opened.

THE COURT: That means she'll only have to apologize to a few billion people.

MR. MUKASEY: The only point, I am not sure whether we are going to say it in summation, we are not going to make a gender issue out of this. We are going to make an issue of the fact that Mr. O'Donnell had some personal problems with her, professional problems with her, which he testified to.

THE COURT: His alleged bias in that regard is of course fair game.

MR. MUKASEY: We're not going to make a gender issue out of it.

THE COURT: Okay. Anything else? All right. Let me give you some general guidelines for summations.

It is often said, and I agree with this to a degree, that as a matter of professional courtesy, counsel do not like to interrupt opposing counsel's closing arguments.

The exception is where the only meaningful correction can be made at the time when the statement is made. So I'll give you two examples. If some counsel states something that is completely outside the record. I'm not talking about competing inferences as to what the circumstantial evidence might or might not permit one to infer. But something completely outside the record, like, I'll give you a bad example, but the defendant here is Countrywide, you all know about Countrywide, you've heard in the radio or television what Countrywide is like. Something like that. I want an objection. In that extreme case, the Court sua sponte will object.

In something a little bit more sophisticated, an argument that is made that I'm sure is very unlikely to happen with counsel as good as the counsel we have in this case. But I have seen it occur in other cases. Where someone just says something that has no support in the evidence. Just completely, you know, out of their head. The time to object to that is then and there. That doesn't mean I won't give a corrective instruction if it is brought to me later. But it will be much less helpful to the jury if that is not brought to my attention immediately. So, if something that extreme occurs, someone should object.

The second example is a misstatement of law. There used to be in some jurisdictions, maybe still is, a rule that

you can't refer to the law on summation. I don't agree with that. You can refer to my instructions. That's the law of this case. So feel free to refer to my instructions. But you better get them right. And if you state a principle of law other than my instructions, you're taking the law into your own hands and you may get a sua sponte objection from me, but you will certainly risk an objection from counsel.

So my point is, you have permission and indeed encouragement to object right in the middle of summation in those two circumstances. A statement of fact that is completely without support in the record, completely, or a statement of law that is completely erroneous.

Anything else, I leave it to your professionalism. If there is some matter, and I will at the close of any summation, even if we're moving immediately into another summation, I'll give you the opportunity to approach the bench if you need to raise that kind of objection after the summation. But, in the two extremes that I mentioned, it is much better to have the correction at the time.

MR. MUKASEY: Judge, is Mr. King going to send around another copy sometime this evening? Is your law clerk going to send another copy of the charge this evening?

THE COURT: Yes, he certainly is. He's already done part of that and he will work on it some more now while I take another matter. Anything else? Very good. I will be involved

in another matter for the next hour and a half. So, do not call chambers -- it is now 5:35. Do not call chambers until sometime after 7, but any time after 8 is fine. If you don't call, I won't be here. We'll see you tomorrow morning at 9:15.

(Adjourned until October 22, 2013, at 9:15 a.m.)